PROCEEDINGS

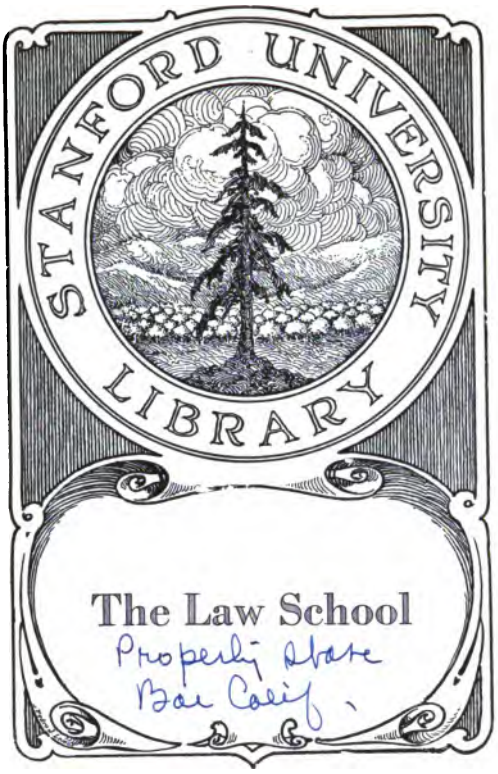
OF THE

TWENTY-THIRD ANNUAL SESSION

OF THE

TEXAS BAR ASSOCIATION

1904



H. C. Carter

PRESIDENT.

PROCEEDINGS

OF THE

TWENTY-THIRD ANNUAL SESSION

OF THE

TEXAS BAR ASSOCIATION

HELD IN THE

CITY OF HOUSTON, JULY 13 AND 14, 1904,

WITH THE

OFFICERS, STANDING COMMITTEES AND ROLL OF MEMBERS

FOR THE YEAR 1904-1905,

AND THE

CONSTITUTION AND BY-LAWS OF THE ASSOCIATION.

AUSTIN:
PRINTED BY ORDER OF THE ASSOCIATION.
1904.

These Proceedings are published by authority and distributed to members of the Association.

A. E. WILKINSON, Secretary.

The Twenty-fourth Annual Session of the Association will be held in the city of Sherman, Wednesday after the second Monday of July, A. D. 1905.

VON BOECKMANN-JONES COMPANY, PRINTERS, AUSTIN, TEXAS.

PROCEEDINGS

OF THE

TWENTY-THIRD ANNUAL SESSION

OF THE

TEXAS BAR ASSOCIATION,

HELD IN THE

CITY OF HOUSTON, JULY 13 AND 14, 1904.

FIRST DAY.—MORNING SESSION.

The Twenty-third Annual Session of the Texas Bar Association was held in the city of Houston, commencing Wednesday, July 13, 1904.

President T. S. Reese called the Association to order, saying:

GENTLEMEN: The twenty-third annual session of the Texas Bar Association is now opened for the transaction of business. I understand that a program for its exercises and order of business has been arranged by the Directors, and we will accordingly hear first the report of the Board of Directors.

Mr. Garwood, of Houston:

Mr. President:

On behalf of the Board of Directors, I desire to present the following report:

HOUSTON, TEXAS, July 13, 1904.

To Hon. T. S. Reese, President Texas Bar Association:

The Board of Directors of the Texas Bar Association respectfully submit the following report:

We recommend that the present meeting of the Association remain in ses-

sion for two days, and thereafter until the business before the Association is disposed of, and that the following program for the session be adopted:

FIRST DAY.

Address of Welcome, Judge Norman G. Kittrell.
Response, Hon. Frank C. Dillard.
Opening Address, President T. S. Reese.
Nomination and election of members.
Report of Secretary.
Report of Treasurer.
Paper, "Certain Needed Reforms," Hon. C. K. Bell.
Report of Committee on Commercial Law.
Paper, "Needed Amendments to the Probate Law," Judge Lewis Fisher.
Report of Committee on Legal Education and Admission to the Bar.
Paper, "The Legal Mind," Judge A. E. Wilkinson.
Report on Judicial Administration and Remedial Procedure.
Paper, "Impeaching the Verdict of the Jury," Judge A. L. Beaty.
Report of Committee on Criminal Law.
Paper, "The Harter Act," John C. Walker.

SECOND DAY.

Annual Address, "Sovereignty," Judge Robert G. Street.
Paper, "Growth of Central Power in the United States," Hon. W. M. Coldwell.
Report of Committee on Jurisprudence and Law Reform.
Paper, "The Old Bar," Judge A. W. Terrell.
Paper, "Law Making," Judge Clarence H. Miller.
Report of Committee on Grievances and Discipline.
Paper, "Texas Rule in Irrigation," Judge Ocie Speer.
Report of Delegate to American Bar Association.
Paper, "The Vendor's Lien in Texas—A Historical Essay," Thomas V. Shearon.
Report of Special Committees.
Paper, "Recent Noteworthy Decisions," Hon. Edward F. Harris.
Report of Committee on Deceased Members.
Election of Officers.
Election of Directors.
Election of Delegates to American Bar Association.
Selection of place of next meeting.
Miscellaneous and unfinished business.

H. M. GARWOOD,
W. H. BURGESS,
E. F. HARRIS,
R. E. L. SANER,
Directors.

Upon motion, the report of the Board of Directors was received and adopted.

THE PRESIDENT: The first thing in the order of business just adopted is the address of welcome, and I take pleasure in introducing to you Judge Norman G. Kittrell, of Houston, who will deliver that address on behalf of the Harris county bar.

Judge Kittrell:

Gentlemen of the State Bar Association:

When, at the last meeting of this Association, the bar of this city extended to you their invitation to hold your next annual meeting here, they did so in no formal or perfunctory spirit, but the invitation was extended with the earnest hope and desire that the same would be accepted, and its acceptance gave to them and to the citizens of this city sincere pleasure, and you are today our thrice welcome guests, and we are your grateful and honored hosts.

We realize today the fulfillment of a long cherished desire to entertain the State Bar Association, and it is our purpose to make you feel that we appreciate how helpful an agency and influence this Association has been in elevating the standard of professional ability and professional ethics, and in promoting the enactment of legislation which has served to enable the courts to accomplish more speedily and efficiently the purpose of their creation, the adjudication of causes and the settlement by orderly and judicial methods of the conflicting claims and interests of litigants. We welcome you as members of an ancient and honorable guild, as devotees of a noble profession, as priests who with clean hands and honest hearts minister within the temples and at the altar of the law.

You have gathered in a city which bears the name of one who in the youthful flush and vigor of his magnificent manhood claimed fellowship with the brotherhood of the bar, and who in that sphere of endeavor bore himself as he did in every field of duty as became the man that he was—able, faithful, efficient, and courageous.

Lying but a little way apart from this busy, bustling mart of trade and commerce is an historic battlefield whereon he won for himself fadeless honor, and, for the young Republic with which his name is indissolubly linked in glory, a place among the nations of the earth.

There stands yet in this city an historic structure wherein he, as wise in council as he had been valiant in battle, met with his co-temporaries and compatriots to plan the future policy of the young nation which they had by their valor and patriotism brought into existence; and as members of the legal profession we can not but rejoice to know that with Texas and with the richest and noblest incidents of her history is immortally linked the name and deeds of one of their brotherhood.

Yet, as brilliant an illustration of the love of liberty and devotion to the principles of free government as is furnished by the career of Sam Houston, it stands by no means alone; for lawyers have been the leaders in every struggle in the Old World and in the New made in behalf of liberty and the rights of man.

The pages of American and English history are luminous with the record of the deeds of lawyers who have led the forces of freedom, and who have dared tyrants and conquered for humanity those rights to which it was entitled, but which by tyrants were denied. Wherever right is battled for, where freedom needed a friend, where constitutional rights demanded a defender and champion, there always the lawyer is to be found in the front battling for principle, contending for human rights, upholding the law, and always the enemy of anarchy and the mob.

Whether on the forum or in the field, whether in council hall or in the forefront of war, the legal profession is always represented, and is ever a controlling force and factor in shaping legislation or in defending with the sword the rights of the people guaranteed by the Constitution unto which they are inherently entitled.

In this city there lived for many years and here died, and in yonder silent city of the dead sleeps one who as a judge nisi prius and on the Supreme Bench left the impress of his profound learning and exalted character upon the jurisprudence of Texas; and, so long as lofty courage, pure and upright living, and profound legal and judicial ability command the admiration of our profession, so long will we and those who shall come after us cherish the memory and the name of Peter W. Gray.

For thirty years there went in and out before the people of this city respected, revered, and honored as a man and as a lawyer that Nestor of the bar of Houston, that courtly gentleman, stainless citizen, and accomplished lawyer, James A. Baker.

This city has contributed most lavishly and worthily to the ranks of our profession, and to the scenes of the labors of the illustrious dead of our brotherhood and to the city which they honored by their lives, and to the surroundings with which they were so long associated, we give you cordial welcome.

Far be it from me to so speak as to touch or tinge with sadness this occasion, which we would fain make one of unrestrained pleasure, but I feel that I should fall inexcusably short of the performance of imperative duty did I not voice to some extent the sorrow we feel that just upon the eve of our assembling death should have laid his remorseless hand upon one so worthy, so revered, so beloved as was Robert Symington Gould.

No purer, truer, manlier man, no more just or upright judge, no more knightlier, gentler gentleman, no more sincere, humble, Christian ever passed from earth to heaven than he. In every field of endeavor he measured up to the full standard of a man. When his country called her sons to battle, he was among the first to answer, "I am ready," and he was

faithful to her flag and her fortunes until that last sad hour when valor could no longer contend against overwhelming odds, and, sheathing his stainless sword that had flashed ever in the forefront of the fighting, he returned to the walks of peace, and was mercifully spared to adorn the highest seat of judicial power, and to illustrate by his lofty and stainless life the dignity and grandeur of heroic manhood in defeat, and to prove that he could be as faithful a servant to his people in peace as he had been their valiant defender in war.

Gentlemen, I trust you will feel we are rejoiced to greet you, and to contribute to your pleasure. If we have failed to make provision in any regard, hesitate not, we pray you, to suggest wherein the deficiency exists and it shall be promptly supplied. Our wives and our daughters and our sweethearts will greet you, and we will strive to provide such refreshments, both solid and liquid, as will meet the highest requirements of professional tradition. We assume, as we believe safely, that you are all gentlemen of tender sentiments and sound digestion.

We propose after an intellectual and oratorical treat which the program prepared promises, to give attention to a program which will appeal to the inner man.

The hour for the beginning of the program will be hereafter named, the hour for the closing has been lost from the calendar, but you shall be at liberty to retire from the scenes of festivity at such hour and by such means of transportation as may be best suited to your then condition.

Our supreme desire and purpose is that the day of your meeting in Houston shall stand as a red-letter day in the calendar of each of your lives, and when in after years the chords of memory are stirred, they will give forth the music of sweet and pleasant recollection.

President Reese:

Gentlemen of the Association:

I take pleasure in presenting to you Mr. Frank C. Dillard, of Sherman, who has been requested to reply on your behalf to the address of welcome to which you have just listened.

Mr. Dillard:

Judge Kittrell, Gentlemen of the Houston Bar:

One night a few years since I was sitting on the veranda of the Ocean House on Block Island. The Atlantic stretched far away to the east. The full moon, just rising, cast a broad strip of silver light across the water. On either side of this was a wall of black. The sea was filled with little white-winged craft. These would pass from the darkness into the light, glide for a little before the eyes with all the beauty of fairy vessels, and then lose themselves in the darkness again.

Today, we members of the Bar Association of Texas assembled here have

laid aside for a little while the toil and weariness of the office, the struggles and disappointments of the court room, to spend a brief season in social intercourse. During that time we shall dwell only in the silver light of perfect good fellowship, far from the care and worry of our daily work.

It is well for men engaged in any common pursuit to gather in convention, and especially is this well for lawyers. There can scarcely be found any other assembly of men, even among the fraternal orders, where there is as genuine a feeling of fraternity as in a gathering of lawyers. We are always glad to be with one another. We enjoy relating to each other our experiences in the office and in the court room. We are glad to tell of our battles and our victories; and occasionally some choice spirit, with boldness and candor beautifully blended, will even tell of his defeats. In the incidents we have to relate, there is sometimes a touch of pathos, often a spice of humor; and now and then these are so mingled that they may start either a smile or a tear. In talking over these things, we are drawn closer together, and the bonds of sympathy and mutual helpfulness among the members of the bar, always close-knit, are woven into yet firmer texture.

In these days there is a stronger reason than ever why we should meet together. It is charged that the spirit of commercialism, which is so all-pervading, has seized upon the legal profession. It is charged that the old ideals are not the ideals of today; that the old notions of legal ethics are esteemed antiquated by many lawyers. It is well for us to meet and take our bearings and see if it is true that the onward sweep of the tide of mercantilism is bearing us from the old moorings; to see if the high standard which the legal profession has raised in the name of probity and justice—of law as a synonym of right—is being lowered in the interest of material gain. It has ever been the glory of the profession that it has stood for the conservation of law and order and the preservation of the stability of the government. If, amid the clash of arms the laws have sometimes been silent, no sooner has the smoke of battle cleared away than the lawyer has begun the rehabilitation of the State. It has ever been the pride of the lawyer that the emoluments of his employment were of secondary consideration; that his chief delight was to see laws wisely enacted and justly administered, and to take part in such administration. These are the principles which have guided us in the past; these are the principles which should guide us in the future. If the charge is true that we have in any respect departed from them, we should make these conventions a starting point from which to return to the old ways. We can never consent that the standard of ethics of our profession should be other than the highest.

The State Bar Association, sir, esteems itself happy on this occasion in meeting in the good city of Houston, and with the bar of Harris county. The warmth of your welcome assures us we are in the house of our friends. I would not be fulsome; I would speak only the words of truth and sober-

ness; but, so speaking, I would say to you that the bar of Texas, in common with the body of the citizens of Texas, is proud of the city of Houston. Already, with your payment of more than seven millions of dollars annually to railroad employes, with large capital invested in manufacturing enterprises, with an extensive and constantly expanding commerce, with your railroads reaching in all directions, with your waterway to the ocean, you have taken a proud place among the cities of the Southwest. When your great ship canal shall be completed to deep water, your place will be prouder still; and, when that good day shall come when the fleets of the commerce of the world shall find no continent of America interposing itself as a barrier between the waters of the Atlantic and of the Pacific, the city of Houston will stand on the southern borders of the Union, a very queen in her beauty, welcoming to our shores the commerce of the far East and calling down the blessings of fair winds and bright days upon the thousand keels which shall bear the products of our grand and beloved Texas across the waters of all seas, to the ports of all lands.

Again, sir, we thank you for your welcome.

PRESIDENT REESE: The Constitution and the custom of the Association have enacted that the President shall open the business of each meeting with an address reviewing statutory changes in the law since our last session. This is an infliction which I would willingly have spared you; but it would be unbecoming a presiding officer to disregard the Constitution he is chosen to enforce. I entreat your patience while I endeavor to discharge this duty.

[The President's annual address, which was thereupon delivered by Judge Reese, will be found in the Appendix to these proceedings.]

MR. EWING, of Houston: *Mr. President:* I desire to offer some resolutions upon a point discussed in the address to which we have just listened; that of the requirement of unanimity in the verdicts of juries. This matter has been several times discussed in the Association, and it seems an appropriate time for us to place ourselves upon record in regard to a matter upon which all members must have their views fully settled and which seems to me, as I am satisfied it does to most of us, one of the most urgently needed reforms in the administration of law.

I move the adoption of the following resolutions:

"*Resolved,* That it is the sense of this Association that, in the interest of our jurisprudence, trial by jury should be so reformed as to abolish the requirements of unanimity of the jury to a verdict in civil cases.

"*Resolved further,* That a committee of five, of which the President shall be chairman, be appointed by the Chair to exert all honorable means to secure legislation carrying into effect such reforms."

The motion to adopt the resolutions was seconded by several members and the mover, in their support, said:

Mr. President: The requirement of unanimity in the verdict of the jury, at least in civil cases, is a relic of a time we have outgrown. It is, today, the source of most of the evils which arise in the administration of our laws. To this are attributable the many delays resulting from mistrials. To the same cause we may trace whatever suspicion of corruption may attach to the jury system. The jury fixer, the briber, can never hope to accomplish more by his methods than the securing, upon the panel, of one or two of his creatures upon whom he may rely to defeat an adverse verdict. To purchase a majority of the jury will always remain impossible to him. If we would remove the very temptation for corrupt men to attempt to tamper with juries, the way to do this is to do away with the unanimous verdict.

The bar should lay aside all personal interests in the matter and vote on the resolution from the standpoint of an outsider who merely wanted to see justice done. This is a proposal that calls into question the patriotism of the individual; it is not merely a personal matter; it is of a deeper significance, and greater and broader action is demanded. Lawyers have the reputation of being a most conservative class, but we should advance as the times demand. Lay aside the swaddling clothes of immaturity and grow into a better manhood. The present jury provisions bring the whole jury system into disrepute. It is not right, not just, not equitable. When a jury brings in a verdict and says, "This is our verdict," they are incorrect; it is not their verdict. Under the present system they must surrender their individuality and their independence.

I did not propose to fight the jury system in itself, but merely this detail of it. The jury is the bulwark of our civilization, upon which our security as an independent people is founded.

If you will give me a jury empowered to render a two-thirds verdict I will give you a jury where the stream of justice will run pure and clear. Vote on this resolution aside from how you will be personally affected by it.

Give me a verdict of nine men against three and I will show you an honest verdict.

MR. SPOONTS, of Fort Worth: *Mr. President:* I wish to make the point of order that the resolutions can not be considered at this time, and discussion upon them is not permissible. We have adopted a regular order of business, reported by the Board of Directors, and under that program the resolutions can not come up now. I do not believe it is the wish of the members to enter into such a discussion.

MR. EWING: We are here to invite discussion, and the one that has just arisen is perfectly germane to the business on hand.

PRESIDENT REESE: The Chair rules that the discussion is in order.

MR. STREETMAN, of Houston: It seems to me, Mr. President, that this discussion would more properly come up on a report of the Committee on Jurisprudence and Law Reform. We have such committee for the purpose of considering and reporting upon questions of this character, and the proper time to discuss and act upon them is when their report comes in. I move that the resolutions be referred to that committee.

MR. EWING: To refer the resolutions to that committee means to kill them by putting the discussion off till our next meeting. I understand that every paper read before the meeting is open to discussion. The President's address introduced this subject and called forth the resolutions.

MR. ALLEN, of Terrell: *Mr. President:* I am heartily in favor of these resolutions, and the time and place to discuss them is here and now—not in the committee room. Every practicing lawyer has already a settled conviction on this subject, and a committee report will neither enlighten him nor affect his opinion.

MR. GARWOOD: *Mr. President:* If I may be permitted at this time, I wish, on behalf of the Board of Directors, to submit a privileged report. We have here a list of twenty-five applications for membership. The Board of Directors have acted favorably upon them, and we desire to submit our report to the convention. All of the gentlemen, I think, will be able to vote intelligently upon the important resolution now under discussion, and they should be allowed to do so.

The report submitted was as follows:

HOUSTON, TEXAS, July 13, 1904.

Hon. T. S. Reese, President Texas Bar Association:

Your Board of Directors beg leave to report that they have had submitted to them the following applications for membership, towit: Hayden W. Head, Sherman; J. D. Wilkerson, Beaumont; J. T. Beaty, Jasper; Otis K. Hamblen, Houston; E. P. Hamblen, Houston; C. G. Krueger, Bellville; William Pierson, Greenville; Thomas W. Masterson, Galveston; M. M. Brooks, Greenville; W. M. Coldwell, El Paso; Walter H. Scott, Houston; Chester H. Bryan, Houston; Will L. Barbee, Houston; Norman G. Kittrell, Jr., Houston; Wadsworth D. Leeper, Houston; Henry J. Dannenbaum, Houston; C. W. Robinson, Houston; J. Harris Masterson, Galveston; Elliott Cage, Houston; J. W. Lockett, Houston; Edward H. Bailey, Houston; James E. Niday, Houston; Clark C. Wren, Houston; each accompanied by proper initiation fee and duly recommended; and, having considered each application, we beg leave to recommend their election to membership in the Association.

H. M. GARWOOD.
R. E. L. SANER.
WM. BURGESS.
ED. F. HARRIS.

A motion that the report of the directors be received and the Secretary directed to cast the unanimous ballot of the Association in favor of the election of the members named therein was adopted, which, being done, it was announced that the applicants had been duly elected to membership.

On motion of Mr. Kittrell, the Association adjourned until 2:30 p. m.

FIRST DAY.—AFTERNOON SESSION.

The Association was called to order by President Reese.

Mr. Garwood, on behalf of the Board of Directors, presented their report upon additional applications for membership as follows:

HOUSTON, TEXAS, July 13, 1904.

To Hon. T. S. Reese, President Texas Bar Association:

The Board of Directors, having had under consideration the applications of Harris Masterson, Houston; A. E. Masterson, Angleton; Geo. E. Lenert, La Grange; and E. M. Haralson, Houston, accompanied by the necessary prerequisites, beg leave to recommend that they be elected to membership.

H. M. GARWOOD.
R. E. L. SANER.
W. H. BURGESS.
ED. F. HARRIS.

On motion it was voted that the report be received and that the Secretary be directed to cast the unanimous ballot of the Association for the election to membership of the applicants therein named, which being done, it was announced by the President that they had been duly elected.

THE PRESIDENT: As to the resolution offered by Mr. Ewing, I find I made a mistake this morning in my ignorance of the rules of the parliamentary proceedings in ruling that the discussion of Mr. Ewing's resolution was in order.

MR. EWING: Will the Chair call attention to the rule?

THE PRESIDENT: The point is, the report is out of order because it is in violation of the By-Laws of the Association; the By-Laws can only be

amended by a vote of two-thirds of the members of the Association. Section 1 provides that the order of exercises at the annual meeting shall be as follows:

1. Opening Address by the President.
2. Nomination and election of members.
3. Report of Board of Directors.
4. Election of Board of Directors.
5. Report of Secretary and Treasurer.
6. Report of Standing Committees as follows: On Jurisprudence and Law Reform; on Judicial Administration and Remedial Procedure; on Legal Education and Admission to the Bar; on Commercial Law; on Publication; on Grievances and Discipline.
7. Reports of Special Committees.
8. Nomination of officers.
9. Miscellaneous business.
10. The election of officers.
11. The annual address to be delivered by the person selected by the Board of Directors shall be made at the morning session of the second day of the annual meeting.

SECTION 2. This order of business may be changed at any meeting by a vote of the majority of the members present.

MR. EWING: Will the Chair indicate when the motion can come up?

THE PRESIDENT: I suppose I am responsible for the procedure adopted this morning. Having no new legislation to review, I wandered off in my address into a discussion of what should be done, and thus brought on the present debate. It can only come up properly for action in passing upon some report, possibly the report of the Committee on Jurisprudence and Law Reform, or under the last clause of our order of business, Miscellaneous and Unfinished Business. I think, according to the practice of the Association, that the subject of any paper or report is open to discussion.

MR. EWING: I move that the order of business be so amended as to permit of the resolution being now adopted.

The motion was seconded.

MR. SEARCY, of Brenham: I consider the subject matter of the resolution of the utmost importance; the matter is a deep one and merits the most careful consideration at the hands of the State Bar Association. We have but a small attendance of the members of the Association here today; tomorrow I understand the attendance will be much larger, and I move that the further consideration of the resolution be postponed until we have a fuller attendance.

MR. EWING: I move that the order of business adopted by this Association be so modified that it be now taken up.

THE PRESIDENT: Your motion is out of order because we have already adopted an order of business at the present session.

MR. EWING: I will amend my motion and move that we reconsider that vote and so modify it as to bring in this resolution at this time.

The motion was seconded.

MR. SPOONTS: I move to amend so that this special matter be made a special order of business for 2 o'clock tomorrow afternoon.

MR. EWING: I accept the amendment.

MR. BURGESS: I move that this special order of business be taken up at 4 o'clock, Thursday, July 14th.

MR. EWING: I withdraw my consent to any amendment, on my part, and I ask that we vote down that special order of business and have a vote on the resolutions now.

THE PRESIDENT: The motion of Mr. Spoonts is that the question of amendment of procedure so as to admit of bringing in a decision of this matter which we were discussing before dinner shall be made a special order of business at 2 o'clock tomorrow afternoon.

MR. EWING: I want the expression of this Bar Association on it.

A MEMBER: I want to make this point of order: If I remember the rules of the Association, the By-Laws provide that no member shall speak twice on the same subject until all the members of the Association shall have had an opportunity to speak on it, and I suggest that Mr. Ewing is out of order.

MR. EWING: When they tell us we must wait until tomorrow to get a full attendance, I want to tell you we have a fuller attendance today than we have had for years.

MR. BRYAN, of Houston: I have voted for the proposed change in the jury system, as suggested by the President today, every time it has been before this Association. I disagree with the gentleman who has just spoken; the second day of this Association generally the attendance is double, and I have attended every meeting of this Association for the last fifteen years; and I shall vote in favor of postponing the consideration of the question until 2 o'clock tomorrow afternoon. I am in favor of nine out of twelve men rendering a verdict.

A division being called for on the amendment of Mr. Spoonts, it was carried by a vote of 38 yeas against 23 noes. The amended motion was then adopted.

THE PRESIDENT: The next order of business is the report of the Secretary.

THE SECRETARY: I will ask that the report of the Secretary and that of the Treasurer be postponed until tomorrow; we have not been able yet to prepare our reports.

A motion to postpose the reports of the Secretary and Treasurer was adopted.

THE PRESIDENT: The next proceeding and order of business is the reading of a paper on "Certain Needed Reforms," by Hon. Chas. K. Bell.

[The paper, then read by Attorney-General Bell, will be found in the Appendix.]

THE PRESIDENT: You have heard the reading of the paper, gentlemen. Is there any discussion desired?

MR. FRANKLIN: I do not wish to consume the time to any great extent, but this is one of the most important papers that has been read before the organization. I will just add this one thing: It has always occurred to me that in Texas and other States there is one necessary reform needed in the interest of the Texas people, and that is the way of collecting taxes. I advocate the collection of taxes semi-annually or quarterly, as by that means only a small amount would be taken from the people in a short time. It occurred to me to add this if it be worthy of consideration.

THE PRESIDENT: The next order of business is the report of the Committee on Commercial Law.

A MEMBER: I move that the report be passed.

The motion was duly seconded and prevailed.

THE PRESIDENT: The next order of business is a paper on "Needed Amendments to the Probate Law," by Judge Lewis Fisher.

Judge Fisher explained that he had left his manuscript in Galveston, and asked permission to deliver the address on the second day, and, on motion to that effect being made, it prevailed, and the reading of the paper was deferred until the second day's morning session.

THE PRESIDENT: It has been suggested to me that the next order of business will be the report of the Committee on Admission to the Bar.

MR. BRYAN: I move that the report of the committee be deferred.

The motion was adopted.

THE PRESIDENT: The next order of business is the reading of a paper by Hon. E. F. Harris, entitled "Some Recent Noteworthy Decisions."

[The paper, which was then read by Mr. Harris, will be found in the Appendix.]

THE PRESIDENT: The next order of business is the report of the Committee on Legal Education and Admission to the Bar, by Judge Simkins.

Judge Simkins, on behalf of the committee, presented the following report:

To the Honorable President and Members of the Texas Bar Association:

In the report of the Committee on Legal Education at the session of the Bar Association in 1898, attention was called to the fact that in England and America there was a general movement to raise the requirements for admission to the bar. A large number of the American States had recently raised their standards for admission to the profession, demanding a longer term of study and a higher order of academic and legal attainments.

Our methods in Texas were contrasted with those of other States, and it was shown that the essential characteristics necessary to one seeking admission to the practice of law, towit: a good moral character, fair general information, and familiarity with the principles of law, were never insisted upon by those charged with the examination of candidates for admission to the profession in this State.

The doors of the district court were practically thrown wide open without reference to the character or knowledge of those who entered. It was further shown in the report of 1898, upon data therein given, that between August 1, 1896, and August 1, 1897, approximately four hundred persons took advantage of the farcical examinations and were licensed to practice in the district courts throughout the State. From that report it was apparent to the members of the Association who felt interested in legal education that the bar of the State could not, under these conditions, sustain itself in the proper performance of its functions in its relations to individuals, or the public, and consequently a resolution offered by a member of the Association was unanimously adopted, which in effect requests the committee who presented the report to draft a bill to be presented to the following Legislature embodying changes in the manner of admission to the bar, that were suggested in the report.

A carefully prepared bill was presented to the Legislature of 1899, but we can find no evidence that any notice was taken by the Legislature except to refer it to the Judiciary Committee, where it was smothered through the opposition of members of the legal profession.

PROGRESS OF THE MOVE.

At the session of the Legislature of 1901, a bill was prepared and passed the Senate unanimously, but was sent to the House too late to have the required action. At the session of the Bar Association of July 1, 1901, progress was reported by the Committee on Legal Education, and a resolution unanimously passed that a public necessity exists for a change in the present laws of Texas providing for the admission of persons to practice law in this State, and the Governor was specially requested to submit the matter to the extra session of the Legislature called to meet on August 8, 1901, as a proper subject for legislation. This was not done, but in the regular session of the Legislature of 1903, a bill was placed in the hands of a distinguished Senator on the first day of the session and through his energy and promptness the bill was finally passed with some amendments to be hereafter noticed, and thus became a law, but not to take effect until July 1, 1903. The law as passed contains substantially the following provisions:

That the judges of each of the five supreme judicial districts shall appoint a board of examiners for their respective districts whose duty it is to examine in writing applicants for the license to practice law.

Four sessions a year at the points where the Courts of Civil Appeals are located, or other places in the district, are to be held.

The Supreme Court prescribes the course of study and the subjects in which applicants are to be examined, and also established general rules governing the examination.

The applicant must be 21 years old, a resident of the State for six months, and of good moral character, these qualifications being evidenced by a certificate from the county commissioners court of the county of his residence. The Supreme Court is authorized to establish rules requiring further evidence of character.

A general average of seventy-five out of a possible one hundred is required of the applicants, provided a grade of not less than fifty is made on any topic required. By Section 7 of the act it is specifically required that graduates of the Law Department of the State University shall take the examination required; and by Section 8 it is required that all practicing lawyers of other States must submit to this examination if they remove to Texas with a view of permanently residing here to practice law.

The law went into effect July 1, 1903. So much for the historical development of the law as finally passed.

THE BOARDS ORGANIZED.

Soon after the passage of the law the several Courts of Civil Appeals organized the examining boards in their respective districts; eminent lawyers

were selected as members of these boards, a majority of whom, imbued with the spirit and purpose of the law, accepted the trust.

It was then deemed advisable to call together the appointees to meet the members of the Supreme Court for consideration and to devise the best methods for securing uniformity of action and putting the law in effective operation. Accordingly, the members of the several boards of examiners met in San Antonio concurrently with the meeting of the Bar Association at the same place in July, 1903, and fully discussed with the members of the Supreme Court all matters deemed essential to the proper execution of the law.

Shortly after this meeting the Supreme Court prescribed a course of study for law students that would reasonably require two years for the proper preparation; designated the subjects in which applicants should be examined, and promulgated such general rules governing the examinations as were deemed expedient in initiating the system.

Under the rules as thus promulgated the several boards began their work, and, as far as your committee has been able to ascertain, with the following results:

In the First Supreme Judicial District a rule was adopted fixing the four quarterly meetings required by law to be held in Galveston on the second Monday in January, April, July, and October.

The first meeting of this board was held in October, 1903, at which time three applicants were examined, two of whom were graduates of the law school of Ann Arbor, Mich., and one a graduate of Yale. All stood excellent examinations and were admitted to practice.

At the January meeting there were no applicants for admission, but at the April meeting there were two applicants, both of whom were rejected. One of these had practiced law for some years in one of the Northwestern States, but had removed to Texas and for several years had followed other lines of business. The other rejected applicant had studied for a year or two in a lawyer's office. At the July session eight persons applied, four of whom were rejected. We have a total of thirteen applicants and six rejections in this district.

In the Second Supreme Judicial District nine persons have applied for admission, who passed satisfactory examinations and were admitted to practice. Your committee is informed that all of them were graduates of law schools in various States.

In the Third Supreme Judicial District the board sitting at Austin has held three sessions.

At the first session two applicants only appeared, one being admitted and the other rejected.

At the second session four applicants appeared who passed the regular examination and were admitted to practice. One of these four was the rejected applicant at the prior examination.

At the third session thirty-eight applicants appeared, passing, as re-

ported, very creditable examinations. Twenty-nine were graduates of the State University for the current year. Seven of these were men who attended the University, but did not receive their degrees, and two others attended other law schools.

So, as reported from this district, we have a total of forty-four admissions between July, 1903, and July, 1904.

From the Fourth Supreme Judicial District it is reported: There were four persons examined in January, of which three were graduates of the Michigan Law School and one had studied law several years in Georgia; all admitted.

At the June examination four persons applied and were examined, but there has been no report on this examination.

Your committee is indebted to Mr. William Aubrey, Chairman of the Board for this district, for full information as to the work done by the examiners during the past year, as well as for a copy of the examination papers used in the last examination.

The papers submitted are, without doubt, most excellent models of comprehensiveness and clearness and most efficient in testing the legal knowledge of applicants.

From the Fifth Supreme Judicial District we have the following report: That eleven applicants were examined and admitted to practice. That seven applicants are now undergoing examinations at the July session of the board, and it is not yet determined how many of them have successfully passed.

We are further informed that out of the eighteen who have applied to this board, fifteen were graduates of law schools.

To recapitulate: We have the number of applicants and admissions since July 1, 1903, as follows:

First District.—Applicants, 13; admissions, 7.

Second District.—Applicants, 9; admissions, 9.

Third District.—Applicants, 42; admissions, 42.

Fourth District.—Applicants, 8; admissions, 4, and 4 in suspense.

Fifth District.—Applicants, 18; admissions, 11; so far reported 7 in suspense.

Making total applications, 90; admissions, 74; in suspense, 11.

Comparing the admissions to the bar within the period of time accounted for with admissions for the same time in recent past years, there is a surprising discrepancy in numbers and a satisfactory difference in quality. The apparently few applications for admission to the bar since the law went into effect may be, however, measurably accounted for by the fact that a very large number of persons anticipating the law rushed into the district courts of the State and were admitted under the standards familiar to the profession in the past.

Your committee feel that it is necessary to call your attention to a certain change which, in their opinion, should be made in the law. By Sec-

tion 7 of the Act of 1903, the law permitting graduates from the Law Department of your State University to be admitted to practice on their diplomas was repealed, and these graduates are specifically required to take the examinations before the State board before receiving a license to practice.

Taking into consideration the length of time required for graduation in the State University, the character of the instruction and the fact that the law professors of that institution are officers of the State and constitute a State Board for the examination of these students, your committee deems it unnecessary to require of them further examination, and thinks it unjust to subject them to the additional expense of that State Board examination after the great expense incurred by them in obtaining diplomas from the University. And besides it is an imposition on the examining board.

It would be an act of justice to restore the law permitting a diploma from the State University to be a sufficient passport to practice in the courts of the State.

In seven of the Southern States and ten of the Middle and Northern States having universities, a diploma from their law schools is sufficient to admit them to practice in their State courts, and it seems to your committee that the action of these States is evidence of a proper and just confidence in their State institutions.

And your committee suggests that this Bar Association should recommend the change as embodied in the resolution hereinafter stated.

It is further the opinion of this committee that clerks of the several Courts of Appeal, who have many duties to perform in connection with the operation of the law, should be compensated, and to that end they recommend that the law should be amended. Your committee is of the opinion that if the law is amended in the manner suggested it will be reasonably perfect and if properly enforced will be a blessing to the public and the profession.

Your committee, through the courtesy of members of a majority of the boards of examiners, has been permitted to examine the carefully prepared questions in the various topics required by the Supreme Court, and take pleasure in stating that the questions generally are well selected and comprehensive, and calculated to thoroughly test the knowledge of applicants in the branches of the substantive law as well as in the pleading, practice, and evidence as applied in this State.

There are, however, differences which should be adjusted by frequent communications between these boards, so that uniformity of standards and rules should be reached, and thus effectually block the effort of applicants in their search for the easiest examinations.

In conclusion, it is earnestly desired that those who may be appointed on the various examining boards will fully appreciate that they are sentinels at the gates of a great profession; that duty well performed means

better preparation and higher standards, which must lead to a reform of abuses now prevalent.

With their report the committee submitted the following resolutions embracing the substance of their recommendations:

Resolved, 1. That Section 7 of the Act of 1903, entitled "An Act to provide for and regulate the granting of license to practice as attorney at law in all the courts of the State of Texas," be so amended that it will hereafter read: "All persons shall be subject to this act except when the person applying for license holds a diploma from the Law Department of the State University."

2. That the law should be amended so as to provide for a reasonable compensation to the clerks of the several Courts of Appeals.

3. That it is the sense of this Bar Association that the examinations should be, as near as practicable, uniform in their scope and comprehensiveness and to this end a meeting of the chairmen for an exchange of papers should be occasionally made, so that a uniform standard of examinations shall be maintained.

THE PRESIDENT: You have heard the report of the committee, gentlemen. What action will you take on the resolutions recommended?

MR. SPOONTS: I move that the two latter resolutions be adopted; that is, that we adopt the resolutions recommended by the committee with the exception of the one relating to the admission without examination of graduates of the State University Law School.

MR. BALL: With reference to the clerks of the Court of Civil Appeals, I think they ought to be willing to do this much for the bar of Texas. The clerks of the Courts of Civil Appeals now make more money than the judges on the bench, and it is a small sacrifice on their part to attend these sessions which are held in their court. I think we should vote down the resolution.

MR. BRYAN: There is nothing requiring the clerk to do any work at all; they do a great deal of work, and they are of great assistance to the members of the examining board. We have given part of our compensation to the clerk, and I think I can convince you that, so far as the small compensation is concerned, there is not enough to pay the expenses of the members attending, and part of that was given to the clerk for his services. As it is now, he is not called upon to do the work.

MR. BALL: I move to strike out the resolution to pay the clerks.

A MEMBER: I move a substitute to the resolutions now before the house and that the resolutions be put before this body and that we take up the resolutions seriatim.

The motion prevailed and the resolutions that the law should be amended so as to provide for a reasonable compensation to the clerks of the several courts of appeals, and that it is the sense of this Bar Association that the examinations should be as near as practicable uniform in their scope and comprehensiveness, and to this end a meeting of the chairmen for an exchange of papers should be occasionally made, so that a uniform standard of examinations shall be maintained, were adopted.

MR. WHARTON: I am opposed to the third resolution. There should be no favoritism. Many a boy might be trotted through the State University without the necessary qualifications, and I venture the assertion that there were many members of the convention who, as poor boys, never attended the State University, and I undertake to say there is many a poor boy unable to go there. I see no reason why the students of this institution should be exempt from the same examination required of other mortals. If they are qualified the examination will not hurt them; if not qualified, they need the examination. There are many other law schools as good, some better, and it is unfair to discriminate against the graduates of Harvard or Michigan in favor of those of our own State. Besides there are other law schools in the State which will be demanding the same right.

MR. SPOONTS: I agree with Mr. Wharton and I think we had better let well enough alone, for if we go monkeying with the law we may get the whole thing repealed.

MR. FRANKLIN: I can not believe that the resolution would in any way effect a repeal. I do regard it as of the utmost importance that there should be every inducement to a young man who wants to enter the bar to go to the University of Texas. I speak feelingly on this subject, because I am one who was denied the benefits of a common law education, and I will state now, and I state it from my own experience, that I do not believe that any man who has to dig out for himself the law and go before a board of examiners and succeeds in passing is as qualified as the boy who has passed the University education. I know that a man who goes to a university gets the benefit of that which he does not get elsewhere; he gets the benefit of the university atmosphere.

JUDGE SPOONTS: If this resolution is voted down, won't it discourage boys from taking the three-years course.

MR. FRANKLIN: I think it will. The boy that makes the sacrifice to go to the University of Texas and enjoys the benefits of that institution, to get the benefit of the tuition which he gets there, to get the benefit of constant association and of trained professors to instill into him the rudiments

of his profession, is entitled to be admitted to practice in any court of this State. If you give to the boy this education he will find this inducement when he undertakes to enter the profession of the law; to do something more than to merely learn enough to pass an examination. One of the troubles is that boys and men that have been induced to enter the profession believe that the lawyer would make as much money a year as anyone else. I want them to realize that it is an ennobling and distinguished profession; that they can not get into it without hard work and that they should go to the University and take the three-years course which will entitle them to the certificate. This examination is for the benefit of those boys who do not enter the University—he must study and qualify himself to pass that examination; but if he can be made to feel that he derives better benefit by going to the University of Texas, and that, with a diploma, means admission to the bar, that would be an incentive, rather than undertaking to teach himself in the office of some lawyer.

Messrs. Searcy, Niday, Burgess, Hume and various other members joined in an extended discussion of the third resolution, which was finally put to vote and adopted.

THE PRESIDENT: The next order of business is the reading of a paper entitled, "The Legal Mind," by Judge Wilkinson.

[The paper read by Mr. Wilkinson, entitled "The Legal Mind," will be found in the Appendix.]

THE PRESIDENT: The next order of business is the report on Judicial Administration and Remedial Procedure.

MR. GARWOOD: It is now so late that I hardly think it is fair to ask them to read it at this late hour; perhaps, by starting at 9 o'clock in the morning we could get through with the business, and I move that the balance of the business go over.

The motion was duly seconded and carried.

It was moved and seconded that a vote of thanks be extended to the Turn Verein for the invitation extended through Judge Kittrell to attend a concert at the hall and in the park adjoining that evening. The motion prevailed.

The Association then adjourned to meet at 9 o'clock a. m. Thursday, July 14, 1904.

SECOND DAY.—MORNING SESSION.

The Association was called to order by President Reese.

THE PRESIDENT: I want to make this announcement: A great deal of time was taken up yesterday by various matters quite interesting, but it left us with a good deal of yesterday's program unfinished; the exigencies of the case are that the discussion should very much be curtailed or that some of the papers be not read, which would you prefer, gentlemen?

MR. J. C. HARRIS: I move that the papers be read and discussion be waived.

The motion was carried.

THE PRESIDENT: The next order of business is the report on Judicial Administration and Remedial Procedure. Is the Committee on Judicial Administration and Remedial Procedure ready to report?

On motion the report of that committee was passed.

THE PRESIDENT: The Association will now give attention to the reading of a paper entitled "Impeaching the Verdict of the Jury," by Judge A. L. Beaty, of Sherman.

[The paper in question, which was here read by Mr. Beaty, will be found in the Appendix.]

THE PRESIDENT: The Board of Directors will have the floor for a moment to present a report upon applications for membership.

The Directors thereupon presented the following report:

HOUSTON, TEXAS, July 14, 1904.

To Hon. T. S. Reese, President Texas Bar Association:

The Board of Directors having had under consideration the applications of B. F. Louis, Thomas H. Botts, Jesse Andrews, and T. C. Rowe, all of Houston, Texas, accompanied by the necessary prerequisites, beg leave to recommend that they be elected to membership in the Texas Bar Association.

H. M. GARWOOD.
R. E. L. SANER.
WM. H. BURGESS.
EDW. F. HARRIS.

On motion the report was received, and the Secretary requested to cast the unanimous ballot of the Association in favor of the applicants, which being done, it was declared that they were elected to membership.

THE PRESIDENT: The next thing upon our program is the reading of a paper entitled "The Harter Act," by Hon. Jno. C. Walker, of Galveston.

[The paper, which was then read by Judge Walker, will be found in the Appendix.]

JUDGE HILL: I move that the Secretary be instructed to furnish the *American Law Review* with a copy of the address just delivered.

After being duly seconded the motion was carried.

THE PRESIDENT: The next order of business is the annual address which will be delivered by Judge R. G. Street, entitled "Sovereignty."

[Annual address, "Sovereignty," will be found in the Appendix.]

MR. GARWOOD: I move that the Bar Association tender the maker of that address our unqualified thanks.

THE PRESIDENT: Your motion is out of order, Mr. Garwood. Our By-Laws forbid all resolutions of compliment or thanks to a member for services rendered the Association.

MR. EWING (addressing Judge Street, whom he presented with a bouquet in the shape of a heart): In your great effort, the applause of the Association attests its appreciation; but, in addition, this heart of flowers as well as the heart of the ladies is with you, and one of them bids me present this testimonial. Though the Association can not by resolution throw bouquets or compliments to a member, it can not prohibit outsiders from doing so.

THE PRESIDENT: The next order of business is a paper by the Hon. W. M. Coldwell, entitled "Growth of Central Power in the United States."

[The paper, which was then read by Hon. W. M. Coldwell, will be found in the Appendix.]

THE PRESIDENT: The next thing on the program is the report of the Committee on Jurisprudence and Law Reform. Mr. J. C. Harris is on that committee.

Mr. Harris, from the committee, presented the following report:

Mr. President and Gentlemen of the Texas Bar Association:

Your Committee on Jurisprudence and Law Reform have the honor to submit the following report for your consideration:

The word "Jurisprudence," originally used by the Romans to signify the scientific knowledge of their own law and afterwards extended and amplified until jurisprudence was defined by Ulpian, the great Roman jurist, as "The knowledge of things divine and human; the science of that which is just and unjust," will be used by this committee in the sense of the *Science of the Law as Administered by the Courts;* thus excluding moral or ethical law and natural or physical law; and your committee will further confine its discussion to the laws of the State of Texas.

I. ADOPTION.

Your attention is called to the fact that Title I of the Texas Revised Statutes confers on the adopted heir the rights of a child only with reference to the estate of the adopter and does not constitute the child a member of the family of his adopter, nor does it invest him with the privileges and duties peculiar to the relation of parent and child as does the Civil Law. (Eckford vs. Knox, 67 Texas, 200.)

Adoption was in practice and recognized under the Civil Law from the earliest days, but was unknown to the Common Law; and when all the requirements of Title I of the Revised Statutes have been complied with in strict legal formality, the only effect is to make the child the heir at law of the adopter, but not an inmate and constituent of the adopter's family. And until there shall be further legislation, there is no method in Texas whereby any person other than the parent can become entitled to the custody of a minor child, except by being appointed guardian by the probate court, as provided by statute. (Taylor vs. Deserve, 81 Texas, 246.)

These are matters which are little understood by the public, and many a person adopts a child in conformity with the statutes, feeling that he thus stands in the relation of a parent to a child, only to discover, perhaps, after years have passed and affection and money have been lavishly expended upon the adopted child, that a worthless and dissolute parent may lawfully reclaim the adopted child. This matter, in our judgment, should be regulated by statute, providing that both parents when living, or the survivor if either parent be deceased, may by deed duly signed and acknowledged by the parents or the survivor of them, and accepted by the adopter, convey their rights as parents in their minor child to the adopter, who shall thereafter stand *in loco parentis* to such adopted child.

II. COURTS.

It is a matter of common knowledge that too many cooks spoil the broth, that two bodies can not occupy the same space at the same time; and that

the Constitution of the United States (Article III, Sec. 1) provides that the judicial power of the United States shall be vested in one Supreme Court. And yet the State of Texas is in the anomalous position of having two Supreme Courts, one for civil cases and the other for criminal cases; and it is a matter of common knowledge that we often have conflicting decisions upon the same question by both of these Supreme Courts.

Your committee, therefore, recommend that Section 3 of Article V of the Constitution of the State of Texas be amended so as to read as follows:

"SECTION 3. The Supreme Court shall have appellate jurisdiction only, except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law and fact arising in causes of which the Courts of Civil Appeals or the Court of Criminal Appeals have appellate jurisdiction, under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by the law the appellate jurisdiction of the Supreme Court shall extend to questions of law and fact arising in the cases in the Courts of Civil Appeals and in the Court of Criminal Appeals, in which the judges of any Court of Civil Appeals or of the Court of Criminal Appeals may disagree, or where the several Courts of Civil Appeals or the Court of Criminal Appeals may hold differently on the same question of law, or where a statute of the State is held void, or where a constitutional question is involved; and a writ of error shall be granted by the Supreme Court to the Court of Criminal Appeals in every case affirmed by said Court of Criminal Appeals in which a death penalty or imprisonment for life is the punishment inflicted."

Every lawyer who has tried a vigorously contested cause with a son or a brother or a close kinsman by blood or marriage of the presiding judge as one of opposing counsel knows that such a trial is unjust to the judge and unfair to counsel on both sides; because either that judge will favor his closely pressed relative, whom it is quite human for the judge to consider entirely in the right; or, on the other hand, that judge, in an endeavor to be absolutely fair, where his heart is so intimately engaged, will discriminate against his relative or kinsman; and thus in any event the trial is unsatisfactory and tends to bring the courts and the administration of justice into disrepute. And for this reason your committee recommend that Article 1068 of the Revised Statutes be amended so as to read as follows:

"ARTICLE 1068. No judge of the district or of the county court shall sit in any cause wherein he may be interested or where he shall have been of counsel, or where either of the parties may be connected with him by affinity or consanguinity within the third degree; and provided in any civil cause where the judge of the district court, or of the county court, may be related to any one of the attorneys engaged in the cause within the third degree by blood or marriage, that upon written objection filed by any party to the suit such judge shall be disqualified to try said cause."

Your committee recommend that Article 996, Texas Revised Statutes, be amended by adding thereto the following paragraph:

"6. The judgments of said Courts of Civil Appeals shall be final in all

cases when the judgment or amount in controversy, or the judgment rendered, shall not exceed five thousand dollars ($5000), exclusive of interest and cost, except as provided in Article 941 of Texas Revised Statutes."

The object of the above paragraph is to so materially reduce the number of applications for writs of error to the Supreme Court, that in every case where a writ of error is allowed the applicant may have the benefit of a thorough and searching investigation on the part of each member of the Supreme Court; and that each member of the Supreme Court may have ample time in which to personally read the application for the writ of error, to read and carefully consider the brief or briefs on said application, to read the opinion of the Court of Civil Appeals, and to read and become familiar with the entire transcript of the case.

The understanding of your committee is, that the Courts of Civil Appeals were originally established for the express purpose of hastening the final determination of causes and to relieve the arduous labors of the Supreme Court; but it is evident to any person giving the most casual attention to the course of litigation that our Supreme Court, under existing laws, can not give much time to the work of passing on applications for writs of error from our five Courts of Civil Appeals, and that it is a matter of physical impossibility for one court to do as much work as five courts.

Every aggressive litigating lawyer at the bar feels that as long as any motion or move can be made in a cause he is bound to make it; and every sensible lawyer knows that, when by the law of the land his case has been decided by the court having final jurisdiction of such causes, he should bow like a good citizen to the judgment of the law.

If it be objected that it is not wise to fix jurisdiction by amounts, the obvious answer is that the final jurisdiction of the justice of the peace is fixed by amount, towit, twenty dollars ($20); and the final jurisdiction of the county court is fixed by amount, towit, one hundred dollars ($100); that the minimum jurisdiction of the State district courts is fixed by amount, towit, five hundred dollars ($500); that the minimum jurisdiction of the United States *nisi prius* courts is fixed by amount, towit, two thousand dollars ($2000); and that while such a basis may not be ideal, it is yet the most practical and the most easy of application, and in any event we are always confronted with that wise and useful maxim—*interest rei publicae ut sit finis litium.*

III. EVIDENCE.

Every practicing attorney knows that there is nothing more unsatisfactory than the present system of taking depositions. And your committee now recommend that Article 2274, Texas Revised Statutes, be amended so as to read as follows:

"The party wishing to take the deposition of a witness in a suit pending in court, shall file with the clerk, or justice of the peace, as the case may be, notice of his intention to apply for a commission to take the answers

of the witness to the interrogatories attached to such notice, or in lieu of interrogatories there may be attached a notice that the party desires the evidence adduced to be taken orally. The notice shall state the name and residence of the witness, or place where he is to be found, and the suit in which the deposition is to be used; and a copy thereof and of the attached interrogatories, or the notice to take evidence orally, shall be served upon the adverse party, or upon his attorney of record, five days before the issuance of a commission; and whenever the adverse party is a corporation or joint stock association, service may be had upon the president, secretary or treasurer of such corporation or association, or upon the local agent representing such corporation in the county in which suit is pending, or by leaving a copy of the notice with attached interrogatories, or notice to take the evidence orally, at the principal office of such corporation or association during office hours; provided, however, that either party may give notice to the other at any time prior to the issuance of the commission that he desires the evidence adduced to be taken orally, and thereupon the testimony of the witness named in the commission shall be taken before any officer named in the commission (such officer first giving five days' written notice to all parties, or to their attorneys, of the time and place of taking the testimony) in the presence of the parties or of their attorneys or agents; and the witness shall be first regularly sworn as such and shall be subject to examination and cross-examination in accordance with the practice and rules of evidence now in use in the district courts of this State; and the depositions taken upon such oral examination shall be reduced to writing by the officer in the form of question put and answer given; and at the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the officer, be taken down by a skilled stenographer or typewriter, as the officer may elect, and when taken stenographically shall be put into typewriting or other writing. The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the officer and of such of the parties or their counsel as may attend; provided, that if the witness shall refuse to sign his deposition so taken, then the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. The officer may upon all examinations state any special matters to the court as he shall see fit; and any question or questions which may be objected to shall be noted by the officer upon the deposition; but he shall not have power to decide on the competency, materiality or relevancy of either question or answer."

IV. MARRIED WOMEN.

Your committee recommend that Article 2967, Texas Revised Statutes, be amended so as to hereafter read as follows:

"All property, both real and personal, of the husband, owned or claimed by him before marriage, and that acquired afterward by gift, devise, or descent, as also the increase of all lands thus acquired, shall be his separate property. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise, or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife; and the wife shall have the sole management of her said separate property, except that any conveyance or mortgage of the same shall be signed and acknowledged by both the husband and the wife."

Article 2967 at present provides that the husband shall have the sole

management of the wife's separate property, and the only change proposed is to give the wife the right to the sole management of her own separate estate. And your committee is moved to make this recommendation in view of the fact that many times the wife is a better business man than her husband; that she is often more sober than her husband; more competent than her husband; and sometimes is the support of both the husband and the children.

Again, when the husband is given the sole management of his own separate property and in addition the sole management of the community property, in which his wife has a one-half interest as an equal co-partner in the matrimonial firm, it seems to your committee that the husband has about rights enough; and that there ought not to be any question whatever about the wife's right to the sole management of property which she owned before marriage or which she acquires from her parents or other kinsman after marriage; in any event we think the husband is abundantly protected in his capacity as the head of the family by requiring that he shall join in all deeds conveying or mortgaging the wife's property.

V. INJUNCTIONS.

Your committee think Article 2992, Texas Revised Statutes, should be amended so as to read as follows:

"No writ of injunction shall be granted unless the applicant therefor shall present his petition to the judge of the court having jurisdiction of the suit, verified by affidavit taken before some officer authorized to administer oaths, and containing a plain and intelligible statement of the ground for such relief; provided, that in the case of the inability or disability of the judge of the court having jurisdiction of the cause, or in case of his absence from the district, such injunction may be granted by any judge of any adjoining district, the injunction being returnable to the court having jurisdiction of the cause."

Your committee recommend the above change, which practically restricts the granting of injunctions to the judge of the court having jurisdiction of the cause, upon the following grounds:

(a) It is more in consonance with a democratic form of government that writs of injunction, which if improvidently granted may work great injury, should be granted by local judges who are familiar with local conditions.

(b) It is a somewhat futile proceeding for a district judge to grant an injunction returnable into another court before a different judge, where the injunction may be promptly dissolved on motion.

(c) The granting of injunctions by judges outside of their home district produces confusion and is likely to result in conflicts of authority which bring the courts into disrepute and contempt among the people.

VI. MECHANICS' LIENS.

Your committee desires to call your attention to the fact that no one

knows what is meant by the Mechanics' Lien Law; and in this connection we refer to Article 3296 of the Revised Statutes of Texas in relation to liens of material men, which reads as follows:

"Any person, firm or corporation, who may furnish any material to any contractor, sub-contractor, agent or receiver, to be used in the erection of any house, building or improvement, or to repair any house, building or improvement, or to construct or repair any railroad or its properties, by giving written notice to the owner or his agent of such house, building or improvement, or the railroad company, its agent or receiver, of each and every item furnished, and by showing how much there is due and unpaid on each bill of lumber or material furnished by said lumberman, corporation or materialman under said contract, at any time within ninety days after the indebtedness shall have accrued, may fix and secure the lien provided for in this chapter as to the material furnished at the time or subsequent to the giving of the written notice above provided for, by filing in the office of the county clerk of the county in which such property is situated * * * an itemized account of his or their claim as provided by this article. * * *"

In explanation of the precise meaning of this article we do not think we can do better than to quote from Sayles' Civil Practice, Vol. II, page 918, as follows:

"The meaning of the article is very obscure. Materialmen, by giving written notice of each and every item of material furnished, showing how much there is due on each bill, at any time within ninety days after the indebtedness accrues, may fix their lien by filing an itemized account. The account may include material furnished after the giving of the written notice. Does this mean that material may be included in the account which was contracted for and delivered after giving the notice, or must all the material be furnished under the contract made before the notice was given so that each and every item may be included and the whole amount due may be stated? The time within which the account may be filed is not stated. The statute evidently contemplates that it may be filed after the notice is given. Notice may be given at any time within ninety days after the indebtedness accrues; but Article 3295 provides that the accounts of all persons, except original contractors, shall be filed within *thirty days* after the indebtedness accrues."

Having regard to the conflicting requirements of the chapter upon Mechanics' Liens your committee recommend that Article 3295 be amended so as to read as follows:

"In order to fix and secure the lien herein provided for it shall be the duty of every original contractor and of every journeyman, day laborer or other person seeking to obtain the benefits of the provisions of this law, to file his or their contract in the office of the county clerk of the county in which such property is situated within ninety days after the indebtedness shall have accrued; and the same shall be recorded in a book to be kept by the county clerk for that purpose; provided, that if any person seeking to obtain the benefits of the provision of this law shall *not* have a written contract, it shall be sufficient to file an itemized account of the claim, supported by affidavit that the account is just and correct, and that all just and lawful offsets, payments and credits known to affiant have been allowed. And upon the filing of any mechanic's lien the county clerk shall issue a

precept to the sheriff or any constable commanding such officer to serve a copy of said precept and a certified copy of the contract or itemized account filed to secure the mechanic's lien upon the owner or his agent, and such precept and certified copy shall be served upon the owner or his agent in the county where the building or other improvement, or railroad, is being constructed, and the sheriff shall return the original precept to the clerk of the county court with the manner of service endorsed thereon; and said precept and the sheriff's return thereon shall be recorded in the Mechanics' Lien Book."

Your committee further recommend that the phrase "at any time within ninety days after the indebtedness shall have accrued," which appears in Article 3296, be transposed from its present position and inserted in such place that the article as amended will hereafter read as follows:

"By giving written notice to the owner or his agent of such house, building or improvement, or the railroad company, its agent or receiver, at any time within ninety days after the indebtedness shall have accrued, of each and every item furnished."

Because, as Article 3296 now reads, it seems to your committee impossible to tell whether the article means to say that the materialman may evidence and secure the lien provided for at any time within ninety days, or that written notice may be given at any time within ninety days.

If the above recommendations are accepted then Article 3305 of the Revised Statutes should be stricken out, and this your committee recommends.

VII. ACKNOWLEDGMENTS OF MARRIED WOMEN.

Your committee recommend that Article 1618 of the Texas Revised Statutes be amended so as to hereafter read as follows:

"The acknowledgment of married women to any conveyance or other instrument shall be taken in the same manner and form as the acknowledgment of a *feme sole*."

It seems to your committee too clear for argument that no useful purpose is subserved by the requirement of the peculiar form of acknowledgment provided for married women.

We presume that the theory of the privy acknowledgment of the wife is that the wife is to be protected from:

(a) The frauds of her husband against her; and

(b) The violence of her husband against her.

And we suggest that every notary public of experience and every practicing lawyer of experience knows that the form of a married woman's acknowledgment utterly fails to accomplish either of these objects.

Practically a notary public looks upon the acknowledgment as a mere formality, and ordinarily gives such a brief explanation of the instrument as leaves the wife little more enlightened as to its contents or effect than she would be without the explanation; and if the wife is in such fear of personal violence from her husband that in her own home she does not dare refuse to sign the deed, then she would not dare to publicly humiliate her

husband by refusing to sign the deed after she was in the notary public's office.

So far as your committee is advised the only effect of the peculiar form required for the wife's acknowledgment is to confuse land titles and promote litigation.

VIII. DIVORCE.

Your committee realize that divorce is a great evil and they feel that an abatement thereof must mainly come through religious and moral instruction; however, as perhaps tending to render divorce laws more efficacious, they submit the following amendment:

That Article 2979 of the Texas Revised Statutes be amended by adding thereto the following:

"Provided, that when a divorce is granted, the party on account of whose wrong the divorce is granted shall not be permitted to re-marry until three years from the date of the judgment of divorce; and any person guilty of violating this law shall be punished by imprisonment in the penitentiary not to exceed three years."

Section 1, of Article VI, of the By-Laws of this Association provides that "It shall be the duty of the Committee on Jurisprudence and Law Reform to consider and report to the Association such amendments to the law as in its opinion should be adopted; and to scrutinize proposed changes in the law and when necessary report upon the same."

In compliance with the above, we have submitted for your consideration such conservative amendments as in our judgment would tend to render the law more certain in its determination, and more easy of comprehension by those most interested; and in conclusion it may be stated that this report has been submitted to each member of this committee, and has been materially amended and emended in conformity with various suggestions made to the chairman by the different members of the committee; but, owing to the inability of the committee to meet for personal conference, this report probably does not in every particular express the precise views of any individual member of the committee; and, therefore, the chairman assumes the responsibility for any deficiencies, while credit for that which is admirable may be awarded to all the members of the committee.

Respectfully submitted,

JOHN CHARLES HARRIS,
Chairman.

The report of the committee was, on motion, received and filed.

The Directors of the Association then submitted the following report:

HOUSTON, TEXAS, July 14, 1904.

Hon. T. S. Reese, President Texas Bar Association:

The Board of Directors beg leave to report that they have had under con-

sideration, each accompanied by the necessary prerequisites, the following applications for membership: Gordon Boone, Navasota; J. C. Feagin, Livingstone; Henry L. Borden, Houston; R. C. Harris, Beaumont; G. H. Pendarvis, Houston; Thomas Shearon, Dallas; and would respectfully recommend that each be elected to membership in the Association.

H. M. GARWOOD,
ED. F. HARRIS.
WM. H. BURGESS.
R. E. L. SANER.

On motion the report was received, and the Secretary directed to cast the unanimous ballot of the Association for the election of the applicants which, being done, the persons named in the report were declared elected to membership.

The Association, on motion, thereupon adjourned until 1:30 p. m.

SECOND DAY.—AFTERNOON SESSION.

PRESIDENT REESE: The next order of proceeding will be a paper by Judge Clarence H. Miller, entitled "Our Lawmakers—the Judges."

[The paper, which was then read by Mr. Miller, will be found in the Appendix.]

Mr. Saner of the Board of Directors presented the following report upon applications of new members:

HOUSTON, TEXAS, July 14, 1904.

Hon. T. S. Reese, President Texas Bar Association:

The Board of Directors report that it has considered the applications of J. E. Griner, Del Rio; W. B. Garrett, San Antonio; J. W. Campbell, Houston; T. C. Rowe, Houston, each accompanied by the necessary prerequisites, and recommend that they be elected to membership in the Association.

H. M. GARWOOD,
R. E. L. SANER.
WM. H. BURGESS.
ED. F. HARRIS.

It was moved and carried that the Secretary be requested to cast ballot for the admission of the members named in the report, and, this being done, the applicants were declared elected.

THE PRESIDENT: We will now take up the special business which went over from yesterday.

MR. BEATY: In view of the limited time we have and the amount of business we have to transact, I move that discussion of Mr. Ewing's resolutions be limited to fifteen minutes on each side.

MR. EWING: It has been brought to my attention that there are a number of papers yet to be read and other business transacted, and of course as sponsor for these resolutions, or one that is for them, I wish to say most emphatically I have no purpose of thwarting the future proceedings of this Association; yet, at the same time, I can not concede that there is anything more important than these resolutions which I have offered to read. Now, as a limit of time has been placed, I want to go one better and want to suggest that we simply put the question without any discussion at all.

MR. BEATY: I accept that as an amendment to my motion.

The motion that the resolutions by Mr. Ewing be offered for acceptance or rejection without discussion was carried.

The Secretary then read the resolutions as follows:

"*Resolved*, That it is the sense of this Association that, in the interest of our jurisprudence, trial by jury should be so reformed as to abolish the requirements of unanimity of the jury to a verdict in civil cases."

"*Resolved further*, That a committee of five, of which the President shall be chairman, be appointed to exert all honorable means to secure legislation carrying into effect such reforms."

A MEMBER: I move a division.

A MEMBER: I second the motion.

THE PRESIDENT: It is moved and seconded, gentlemen, that the resolutions just now read be now adopted. As many as are in favor of that motion will signify by rising and remaining standing till counted.

[Forty-four arose to their feet.]

THE PRESIDENT: Those who are opposed to the adoption of the resolution will rise to their feet and remain standing until you are counted.

[Thirty-three arose to their feet.]

THE PRESIDENT: I declare the resolutions adopted by the Association.

THE PRESIDENT: In my hurry this morning I omitted the paper, "The Old Bar," by Judge A. W. Terrell, but Judge Terrell writes me he is unable to be present, and has been too busy to prepare his paper. I will read you his letter:

AUSTIN, July 11, 1904.

Hon. T. S. Reese, President State Bar Association.

MY DEAR JUDGE: My canvass for the Legislature just closed, as you know, last Saturday. My pronounced opposition to nepotism in public offices, against court house rings, gaming, whisky joints that violate the Sabbath, ward heelers, and corruptionists has kept me too busy to have ready a paper on "The Old Bar of Texas."

Though successful, I expected defeat, for I could not remain silent on matters that affect so vitally the moral atmosphere of Austin and the welfare of the University. Within two weeks I will finish my paper on "The Old Bar" and send it to you for such use as you may choose to make of it.

Truly your friend,

A. W. TERRELL.

MR. SANER: I move that Judge Terrell's paper, when received, be published in the Proceedings of this meeting.

A MEMBER: I second the motion.

The motion was carried.

[The paper by Judge A. W. Terrell, subject, "The Old Bar," has not been received by the committee in time for publication.]

THE PRESIDENT: The reports of the Secretary and Treasurer, which were passed over from yesterday, will now be taken up.

MR. GARWOOD: The Directors, whose duty it is to pass upon these reports before their submission to the Association, present the following report:

HOUSTON, TEXAS, July 14, 1904.

Hon. T. S. Reese, President Texas Bar Association:

Your Board of Directors beg leave to report that by reason of the absence of the Treasurer and of the necessary books of account, we are unable to act upon the reports of the Treasurer and Secretary, and we would ask that we be permitted to prepare our report at a later date in time for incorporation in the printed proceedings.

H. M. GARWOOD.
R. E. L. SANER.
WM. H. BURGESS.
ED. F. HARRIS.

On motion the request of the Directors was granted, and they were authorized to prepare their report after adjournment, the same with the Secretary's and Treasurer's reports to be incorporated in the minutes.

The report of the Directors prepared in accordance with this

resolution and those of the Secretary and Treasurer, omitting the vouchers and schedules attached thereto, were as follows:

HOUSTON, TEXAS, July 13, 1904.

Hon. T. S. Reese, President Bar Association, Austin, Texas.

DEAR SIR: The Board of Directors beg to report that they have examined the accounts of the Secretary and Treasurer and find the same correct.

Respectfully submitted,

H. M. GARWOOD,
Chairman.

SECRETARY'S REPORT.

To the President and Board of Directors of the Texas Bar Association:

Your Secretary would respectfully submit the following report of his transactions during the past year. This report covers the time from the 7th day of July, 1903, with which, inclusive, the last report closed, up to the present day, July 13, 1904, and including some payments made this day, the schedules herewith attached showing what payments are so included.

During that time the Secretary has collected and charges himself with tne following sums:

Initiation fees	$250 00
Annual dues for 1901	5 00
Annual dues for 1902	40 00
Annual dues for 1903	152 50
Annual dues for 1904	95 00
Total	$542 50

Against this your Secretary asks credit as follows:

Paid stenographer's bill for meeting of 1903 (receipt herewith)	$ 45 00
Paid for postage (at various times)	30 83
Paid express	35
Paid telegram	25
Salary as Secretary as per former resolution of Association, twelve months, July 1, 1903, to July 1, 1904, at $10 per month	120 00
Paid Wm. D. Williams, Treasurer (as per his report)	346 07
Total	$542 50

Accompanying this report your Secretary submits the following exhibits explanatory of his books and this and his previous reports submitted, and showing the names of those by whom the various amounts reported by him as received, have been paid, and on what account, viz.: "Exhibit A," receipts reported at the annual meeting in July, 1902; "Exhibit B," receipts reported at the annual meeting in July, 1903; "Exhibit C," receipts re-

ported at the present meeting. He submits also his ledger account and stub books of all receipts issued by him during the period, these exhibits being made to facilitate the checking of such accounts and to show precisely the payments included in this and each of his previous reports.

Respectfully submitted,

A. E. WILKINSON,
Secretary.

TREASURER'S REPORT.

To the President and Board of Directors of the Texas Bar Association.

GENTLEMEN: I beg to submit the following report of transactions had as Treasurer of the Texas Bar Association during the last year:

Balance on hand as shown by my last report	$328 66
Received from Secretary	346 07
Total	$674 73

I have paid approved bill as follows:

Printing bill of Von Boeckmann-Jones Co., as per order of Directors	281 75
Balance on hand	$392 98

Respectfully submitted,

WM. D. WILLIAMS,
Treasurer.

THE PRESIDENT: The next order of proceeding will be the report of the Committee on Grievances and Discipline, by Judge Tarleton.

Judge Tarleton, Chairman of the Committee on Grievances and Discipline, then read his report as follows:

To the Hon. T. S. Reese, President State Bar Association:

SIR: Your Committee on Grievances and Discipline beg leave to make the following report, the subject matter of which is germane to the purpose and object of this committee:

Since the last meeting of this Association, public attention has been called on several occasions and from different directions and locations to an alleged violation of the Act of 1901, defining barratry and prescribing a penalty therefor.

By way of preventing the abuse which consists in the commission of this offense, a very large majority of the members of the Fort Worth bar adopted a Constitution and Code of Ethics organizing the Fort Worth Bar Association.

The objects of the Association are thus stated: (1) To advance the interests of the Fort Worth bar; (2) to correct abuses of the privilege of membership therein; (3) the general supervision of the professional con-

duct of all persons in Tarrant county connected officially with the administration of the law and general supervision of the conduct of all persons in charge of the public records of said county; (4) and generally to preserve for the profession of the law in this community that confidence and respect to which it is justly entitled.

By this Constitution and Code of Ethics lawyers are required to:

1. Observe a high standard of professional honor and integrity and a decent regard for all well-founded public opinion of the proprieties of the lawyer's profession and calling, and to exercise an earnest effort for observance in general of the ethics of the legal profession as they are commonly understood and accepted.

2. Maintain the fairness of jury trials, and to exact of county officials a most careful and impartial attention to their duties in the matter of the selection of talesmen and special jurors whose names are not found on the regular jury list, and report to this Association or to the court any action directly or indirectly attempting improperly to influence the action of jurors or persons liable to be summoned as jurors in any case or class of cases for trial or expected to come to trial.

3. Report to the court the name or names of any person or persons presuming to practice law in this community without first complying with and conforming to the requirements of the Act of the Twenty-eighth Legislature relating to the practice of law and admission to the bar in the State of Texas.

So, also, members are prohibited from:

1. Taking or accepting employment as counsel in any case upon an agreement or understanding as a consideration and an inducement for employment, that such attorney shall pay or become liable for the expenses of litigation or any part thereof other than for the personal expenses of such attorney.

2. From exciting or stirring up suits, and from encouraging litigation devised or prosecuted with a purpose to vex and harass a party to same.

3. From complicity, directly or indirectly, in any suit or threat of suit where there is not a reasonable appearance of right in the interest with which they are connected.

4. From the solicitation of professional employment for themselves through the agency or employment of others for any consideration deemed valuable in law, or by themselves for any such consideration, or from giving to any person any valuable consideration as a reward or return for services in procuring such professional employment, and from offering or giving any inducement deemed valuable in law, under any sort of pretense to any person, whereby it is intended to procure or induce such professional employment; and no member of this Association shall in person or through the agency of another engaged by him for that purpose, seek or solicit employment as counsel in any particular pending or prospective litigation.

Your committee has deemed it proper in the discharge of their duty to call attention to the steps thus taken to accomplish the purpose indicated.

To further accomplish this purpose, it has been recommended from prominent professional sources that the statute on the subject of barratry be so amended as to permit a defendant to plead barratrous conduct on the part of the plaintiff and his attorney in any given case in bar of a recovery therein.

It would seem to your committee to be wise and proper that this Association should recommend to the Legislature the adoption of such an amendment, and that it should also by some action encourage the organizations in the different counties of the State of county bar associations (such as that created by the Constitution and Code of Ethics of the Fort Worth Bar Association).

Respectfully submitted,

B. D. TARLTON, Chairman.
H. G. EVANS.
F. M. NEWMAN.
JAS. E. HILL, JR.

THE PRESIDENT: You have heard the report of the committee; what will you do with it?

It was moved and seconded that the report with the suggestions made be adopted.

MR. DAVIS, of Bexar county: In pursuance of the reading of that report, I see from the conclusion of the report just read that the committee recommend that we take some steps to encourage the organization of local bar organizations throughout the State; you will observe further from the report that something is said with reference to the ethics of this profession. To my mind we can not properly subserve and elevate the profession unless we more thoroughly organize the bar by promoting the organization of local associations. San Antonio, just about the time of the organization of the Fort Worth Association, also organized a local bar association, with a code of ethics copied largely from that which obtains in the State of Virginia. I have observed that the by-laws of these associations authorize the organization of local associations in each county; provided further that delegates may be sent from each local association. It seems the provisions of the by-laws have not to any extent been observed; in other words, that association, as I have seen it, has been composed of volunteers; and, if you will observe the attendance, instead of members of the bar from all sections of the State, we are largely composed of lawyers from the cities. I believe we ought to encourage the organization of local associations in every county in Texas; that these local associations ought to be the foundation and constitute the majority of the State Association; that there ought to be discussed and presented to the local associations

first, the questions which we come here to discuss at our annual meeting. The result would be we would have matured ideas instead of having, as we do, those of volunteers from special sections of the State. Take for instance the legislation with reference to admission to the bar. That was presented to this Association fifteen years ago; and, after fifteen years of effort, we finally succeeded in getting the Legislature to pass that much-needed law. Again, report is made this morning by Mr. Harris that the matter of taking depositions was presented fifteen years ago, and he still contends for that measure. I will state this: If we organize associations in every town in Texas, and get hold of the country lawyer and encourage him to take an interest in such measures, he coming in contact with people throughout the State, we could then come up here, and, instead of taking fifteen years to get into the Legislature, we ought to do it in much shorter time. I make the motion that a committee of nine be appointed, with power to appoint such help as they deem proper; that we make an effort to organize this year as many counties in Texas as possible, and that these delegates be requested to send their delegates to the next Association.

MR. WHARTON: I second the motion.

MR. DAVIS: I will amend that motion by moving that this Association recommend the formation of local bar associations throughout the State, and that they may avail of the opportunity of sending three delegates each to this Bar Association; further, that a committee of five be appointed to bring this to the attention of these local bar associations throughout the State.

The amendment was accepted by Mr. Davis, and the motion was carried unanimously.

THE PRESIDENT: The next order of proceedings will be a paper, entitled "Defense of the Texas Rule in Irrigation," by Judge Ocie Speer.

[The paper, which was then read by Judge Speer, will be found in the Appendix.]

THE PRESIDENT: The next thing, gentlemen, is a paper by Thomas V. Shearon, of Dallas, entitled "The Vendor's Lien in Texas—An Historical Essay."

[The paper, which was then read by Mr. Shearon, will be found in the Appendix.]

MR. BURGESS: I move the appointment of a committee of five for the purpose of selecting a list of delegates to represent the Association at the Universal Congress of Lawyers at the World's Fair at St. Louis in September at the meeting of the American Bar.

After being duly seconded, the motion was carried, and the President appointed Edgar Watkins as chairman of that committee, with Messrs. L. R. Bryan, F. C. Dillard, Jas. E. Hill, and L. W. Moore.

THE PRESIDENT: At the last meeting of the Association at San Antonio a paper was read by Judge Brooks, reference to which will be found on page 48 of the Proceedings of the twenty-second annual session of this Association. It was entitled "The Increase of Litigation in Cities, and Some Suggested Amendments to the Practice Act." Upon the reading of that paper, motion was made by Mr. Ball that a special committee, with Judge Brooks as its chairman, be appointed to consider the paper submitted, and prepare bills embodying the ideas contained in it, to be submitted at this meeting.

JUDGE BROOKS: *Mr. Chairman and Gentlemen of the Convention:* I regret the fact that the committee that was appointed including myself, overlooked the requirements in the resolution which was finally adopted, which was that bills should be printed and copies furnished to the members thirty days in advance of this meeting; therefore, that duty was not performed.

I regret also, and will state in behalf of the committee, that we feel keenly the loss of one of that committee, one of our ablest lawyers, a gallant gentleman and a man that we all praised as a lawyer and citizen, who has passed to his eternal rest, Robert G. West. I will now read you the report made by this committee.

To the President and Members of the State Bar Association:

We, your special committee appointed by the Association at its last annual meeting to consider and report on certain amendments to the "Practice Act," suggested in a paper read before the Association at that time, beg leave to submit the following:

1. We recommend that the statute which now permits pleadings to be amended any time before announcement of ready for trial be changed so as to require all amended pleadings in cases in which service has been complete for thirty days to be filed ten days prior to the day on which said case is set for trial, and to that end we suggest Article 1188 of the Revised Statutes be amended so as to read as follows:

"Article 1188 (1192). All parties to a suit may in vacation amend their pleadings, may file suggestions of death and make representative parties, and make new parties, and file such other pleas with the clerk of the court in which such suit is pending as they may desire. And any party may in vacation intervene in any suit pending, such amendments and pleas subject to be stricken out at the next term of the court, on motion of the opposite party to the suit, for sufficient cause shown or existing, to be determined by the court; provided, that it shall be the duty of the party filing

such pleading to notify the opposite party or their attorneys of the filing of such papers within five days from the filing of the same; provided further, that all amendments to pleadings, pleas, and pleas of intervention must, when court is in session, be filed under leave of the court, upon such terms as the court may prescribe, and, in all cases where service has been complete for thirty days, all such amendments and pleas shall be filed at least ten days before such case is set for trial, and no amendment or plea shall be filed thereafter, except in the discretion of the trial judge, where good excuse is shown why such amendment or plea was not filed earlier. And be it further provided that a party filing an amended pleading of any kind shall immediately furnish a copy of same to the attorney of record for the opposite party, if he has an attorney of record; said copy may be either delivered in person or sent by mail."

With this amendment, the trial judge will then have power under Article 1289 to settle all questions of law in advance of the day set for trial. Article 1289, Revised Statutes, provides that: "In all cases in which juries have been demanded by either party, all questions of law, demurrers, exceptions to pleadings shall, as far as practicable, be heard and determined by the court before the day designated for the trial of said jury cases."

This statute, however, is practically nullified by the statute which permits pleadings to be amended any time before announcing ready for trial; because the court now can only require a hearing of such exceptions as are on file. The result is that, although a case may have been on file a year or more, the only answer will be a general demurrer and a general denial, and, at the last moment when the case is called peremptorily for trial, the defendant asks leave to file an amended answer containing numerous special exceptions and setting up new facts as defensive matter. It then becomes necessary for the court to delay until the plaintiff can examine the pleading filed, and perhaps to allow him to file a supplemental petition in reply. Then follows the hearing of the exceptions, and all this time the jury and the witnesses are uselessly in waiting.

We believe that all the questions of law should be settled in advance of the time set for the trial before the jury. It will enable the trial judge to dispatch business more rapidly; it will give the parties a better opportunity to frame their pleadings, especially those that are in reply to something filed by the opposite party; it will give the trial judge a far better opportunity to carefully consider the questions of law presented, because now such questions are generally presented to him while the jury and the witnesses are in waiting for the trial, and he has no time to take them under advisement or make any investigation of the law for himself. Such a change would save great expense to the counties and to litigants, besides the annoyance to persons and witnesses of waiting in court for a day or two perhaps while the pleadings are being amended and the law questions with which they have no concern are being argued to the judge.

2. We recommend that a statute be passed requiring that in all suits

on promissory notes or other written obligations fixing the amount due and in suits on verified accounts permitted under Article ——, Revised Statutes, the defendant must file an answer under oath setting up a defense involving some question of fact before the case shall be allowed to be placed on the jury docket.

Under the law as it now stands, a defendant in such a suit may file a general denial and place the case on the jury docket by demanding a jury. This results not only in delaying the case frequently for a year or two, when the defendant has no defense whatever; but the case, by taking its place with the settings in the jury docket, crowds other cases out of a setting and adds to the long list of useless delays that are now endured.

3. We recommend that the statute with reference to demanding juries be amended so as to require parties to demand juries on the first day of the term and to pay the jury fee at the time of such demand or to make an affidavit of inability to pay same.

4. We recommend that a statute be passed requiring all pleadings to be verified and further requiring that all answers shall either admit or specifically deny the facts set out in plaintiff's petition or allege that the party has no information therein, and that all facts set out in plaintiff's petition which are not specifically denied or as to which the defendant does not aver that he has no information thereon shall be taken as prima facie true, and no proof shall be required of any fact admitted in the answer.

We suggest that the affidavit required should be similar to that required in the equity practice; that is to say, where the facts are within the party's knowledge, he shall so swear; and, where they are made on information and belief, he shall swear that he verily believes them to be true; and, where a defendant has no knowledge as to facts set out by plaintiff, he shall so swear and request that plaintiff be required to prove same.

Respectfully submitted,

S. J. BROOKS.
JOHN T. DUNCAN.
C. S. BRADLEY.
THOS. H. BALL.

THE PRESIDENT: You have heard the report of the committee, gentlemen; what is the pleasure of the Association?

MR. MILLER: I move that the report be adopted.

MR. SPOONTS: I do not endorse that part of the report requiring pleadings to be sworn to; that part of the proceeding has been condemned by text-writers generally, and they have criticised it as being productive of perjury. To undertake to require the pleadings to be sworn to in all instances seems to be wrong; I do not believe it is productive of good results; I believe that it will cause many a man to swear to a lie where otherwise he would not do so. Pleadings are largely made up of conclusions, and so

far as I see text-writers condemn it, and Mr. Fisher says his observations have taught him that one side or the other is almost always wrong. I move that the back part of the report be stricken out which relates to swearing to pleadings.

THE PRESIDENT: The motion, gentlemen, is to strike out that part of the report which requires pleadings to be sworn to.

MR. ALLEN, of Terrell: I move that the entire report of the committee be received and ordered printed in the procedings of this Association and be referred for action to the committee at its next meeting.

JUDGE BROOKS: I am willing to accept the substitute for the first section only.

Mr. Rhodes Baker offered an amendment to the report, as follows:

"WHEREAS, a necessity now exists that our practice act be amended so as to limit the right of the parties to file pleadings to such a time before the trial as not to cause the trial to be delayed; that is, the amendment of Article 1289, Revised Statutes, so as to cause parties to bring pleadings to final issue ten days before the time of trial in all cases where service is had more than thirty days before trial."

The amendment was adopted, and a motion to adopt the report as amended was seconded and carried.

PRESIDENT REESE: The Committee on Deceased Members will present their report if now ready.

MR. SONFIELD: Mr. President, your committee regret that the lateness of the hour precludes such consideration of their report by the Association, and expression of personal appreciation of the deceased by its members as would be desirable in view of the number and distinction of the members whom the Association has lost during the past year. Our report is somewhat lengthy, and, in view of the impossibility, for lack of time, of giving expression of our respect otherwise than through the printed page, your committee would move that the reading of the report be dispensed with, and that the Committee on Publication be requested to incorporate it in the published proceedings.

The motion was adopted. The report of the committee was as follows:

To the President and Members of the Texas Bar Association:

Your Committee on Deceased Members beg to submit the following report:

We have come to the silent hour; we meet, we grip the hand and speak the word of cheer. As iron kindleth iron, so the contact of kindred spirits kindles the flame of hope and makes brighter the path before us. We would live. We cling to life. But desire does not stop, nor is it content with present life. The soul of man is too large to be thus bounded. To be satisfied to breathe a while the breath of life, to feel anon the touch of death, and then to die forgotten. The sun shines out as of yore; the stars twinkle as was their wont; the busy wheels of commerce revolve; all things move on as though we had not been. 'Tis true we are units in life, but, alas, how insignificant one unit among so many. We all crave earthly immortality. We would live on earth after we have died. We would make impress upon the world, so that in leaving it we will be missed, if not by the many, yet by the few with whom contact has been intimate. There is no nobler part of our proceedings than the silent hour, when the ranks of the living, in full battle array, rest from the clash of arms to look upon the face of our dead comrades; they who fought with us, side by side.

Since last we met, the hand of death has been laid heavily upon us. Young men in the zenith of life and old men, veterans, they who laid, and laid well, the foundations of our judicial system, have gone hence. We shall see them no more. And your committee regret that, by reason of the fact that the death roll is so long, it has become necessary to shorten the memoir of each of those who have passed away.

JAMES MOSCOI SEMPLE.

Old age reminds one of death, but youth and life are synonymous. Youth is the springtime of life, forerunner of a summer of ripeness, autumn of harvesting, and winter of enjoyment of goods stored up. Beautiful as is the springtime, how incomplete the year without the other seasons; so with life. Beautiful as is the spring, the youth of life, how incomplete that life that is robbed of its other seasons. Our friend, our brother, died young. The life had but budded when the blast of death was felt, and the eyes, so fully opened to impressions of joy, closed to the things of earth. The body, the regal home, was without a tenant; from the windows no soul peeped forth. How much of hope was inwrapped in this youthful life; how full of promise its opening. Great expectations were indulged by those who loved, and even those who barely knew him.

His youth was one of exceptional outreach for knowledge; he was a hard student. He was a graduate of Williams and Jewell College, Missouri, finishing his course in his sixteenth year. Soon thereafter he obtained a position as teacher in the Pierce City College. In the middle of the session the president of the college resigned, and young Semple was elected in his stead; this at the age of seventeen. So successful was he that the promoters of the college besought him to retain his position, but the law was his goal and this he sought. He therefore entered a lawyer's office in

Indiana, where he remained an earnest, persevering student for two years. Then he removed to Sherman, Texas; his disabilities as a minor were removed, and he was licensed to practice law. He threw his whole soul into his profession and attained high position for one so young, when death claimed him, closing his eyes in the last sleep at the age of twenty-nine. Though he lived but a short life, it was a purposeful life, and, therefore, well lived. To his wife, his circle of loved ones, and a host of friends he leaves the memory of a beautiful life.

GENERAL THOMAS NEVILLE WAUL.

Hardly had we reached our homes after attendance upon last year's Association meeting, than came the tidings of the death of one who in his long life exemplified in marked degree all those attributes which constitute a good and worthy citizen. The highest type of the courtly, chivalrous Southern gentleman of the old school. One whose character embodied those qualities which irresistibly inspire affection, respect, and admiration—General Thomas Neville Waul.

General Waul's life illustrated the power of heredity. He was the last living descendant of the Wauls of South Carolina. His grandfathers on both sides were active participants in the great struggle for independence in the Revolutionary War. And when, through mighty conflict, independence had been achieved and the long war ended, they settled in South Carolina. Young Waul entered the University of South Carolina, but was unable to complete his education by reason of the death of his father, his poverty, and his feeble health. This trinity of woes left him, at the age of 17 years, to mount his horse, turn his back upon his ancestral home, and go forth alone with all of his possessions packed in a little valise to seek his fortunes in a strange world. Reaching Florence, Ala., very much wearied, he resolved to remain there a little while to recuperate and prepare for further journey; but, learning of a vacancy in the principalship of the Male Academy, he applied for and received the appointment. Here he remained for one session, but having resolved upon the law as his profession, his ambition to enter thereon led him to leave his position and to proceed to Vicksburg, Miss. There he formed the acquaintance of S. S. Prentiss, who, though at that time a mere youth, had already exhibited those qualities the development of which in after life made him so great a power. Young Waul was much taken with the personality of Prentiss, the attachment was mutual, and we find the young student entering upon his study of the law in the young lawyer's office. Eager to learn, he soon acquired a degree of efficiency, and in 1835 was admitted to the bar. He entered upon his chosen profession with much ardor and enthusiasm, the fruit of which soon appeared in a goodly portion of success. Ere long he removed to Yazoo City, Miss., and then to Grenada. In 1836 he was married. Soon thereafter he removed to the then youthful State of Texas,

where he established a plantation in Gonzales county, opening a law office, however, in New Orleans to attend to his business in Mississippi.

When the first whispers of war or of its possibility were heard, General Waul determined upon his course. In his great struggle against the Know-Nothing Party, he made a campaign for Congress, which campaign was filled with the eloquence of his speech. Addressing an audience at Seguin during this campaign, someone in the audience called out: "But suppose that Lincoln should be elected, what would you do then?" Without a moment's hesitation he replied: "God Almighty grant that that day will never come, yet, should that evil day arrive, then, as under all other circumstances, I shall remember that I am a native son of the South and shall say to her as Ruth said to Naomi: 'Whither thou goest I will go, and where thou lodgest I will lodge. Thy people shall be my people, and thy God my God. Where thou diest I will die, and there will I be buried; the Lord do so to me and more also if aught but death part thee and me.'" As can be imagined the scene that followed was indescribably electrifying. The tears flowed down hundreds of cheeks, and a wave of patriotism swept over the assembled multitude. How true he was to his word is a matter of history; for, when the thunder of war had but begun to roar, General Waul organized 2000 troops; they were known as "Waul's Legion." We can not trace his military record; suffice it to say that no son of the South bore himself more manly and with more loyalty and none had in a greater degree the confidence of the people than General Waul. The war ending, we find him elected to the first reconstruction convention, and those there assembled heard his brave, wise, and conservative views. Having through the war lost his wealth, he removed to Galveston, where he resumed the practice of the law, enjoying an eminently large practice. And, when age crept upon him, he retired to a farm in Hunt county, where he lived his last days in deserved peace. He lived to a good old age. Ninety years was allotted to him. Looking upon him from whatever standpoint, as lawyer, statesman, or private citizen, he stands high upon the pages of Texas history. He was a man of great mental reach, of broad culture, of great courage, both moral and physical. His was a pure life, possessed of and possessed by lofty religious convictions. He sought to serve God and his fellow men. He lived on when nearly all the comrades of his youth and manhood had passed away. Yet his was not a lonely life, for he kept in touch with life even to the end, and youth and matured manhood sought him out and held him in high esteem. As lawyer, the memory of his learning, his ability, fidelity, and integrity abide with us and inspire in us the desire to attain unto his high ideal. We bid farewell to the soldier whose legion, with him in command, fought well, and to the statesman we say, farewell. Your labors were not in vain. They tell today. You lived to see the dream of your manhood gloriously realized in a re-united country, with no North, no South, nor East nor West, but one flag floating triumphantly over all and honored by all the nations of the earth.

JUDGE ROBERT S. GOULD.

Another veteran has gone from among us. But a few days ago we learned with sincerest sorrow that Judge Robert S. Gould had been called hence. For forty-four years he lived in Texas, and as lawyer, judge, instructor his success was eminent and proved him a most useful citizen to the State at large; so much so that the impress of his mind, his character, his learning upon our State will never, and can never, be effaced, while love for splendid character and lofty example excites admiration in the human breast.

A native of North Carolina, he came to Texas in the first flush of young manhood. He had received a thorough education, being a graduate of the University of Alabama. On coming to Texas, he settled at Centreville, Leon county. For a while he struggled as must every young lawyer, waiting patiently the coming of clients. But the day soon dawned for him, and before long he had attained a high round on the ladder of his chosen profession. Soon he was elected district attorney, which office he filled with unusual skill and ability for two terms, but, preferring private practice, he refused to stand for re-election. He was not long, however, permitted to thus enjoy the private practice, for the people of his district demanded that he accept the district judgeship. His courage, his honesty, and his fine mental ability won for him enviable distinction in that high office. Then came the war. He resigned his office, having heard the call of his Southland, laid aside the judicial ermine, and went to the front as a captain. Soon he was elected to the command of Gould's battalion. Good soldiers these whose deeds of valor spread far their fame. When the war ended he returned to the State of his adoption, and to a disheartened and discouraged people; preached by precept and example the necessity of yielding to the inevitable, pointed to the brighter day that was coming, and sought to rebuild and rehabilitate the glory of his State. He resumed the practice of the law, to which he had resolved to devote himself the rest of his life, but again he yielded to the voice of the people whom he had so well served in both peace and war and was in 1866 again elected to the district bench without serious opposition. The country was at that time under the domination of military authorities, who, under the pretext that he was an impediment to reconstruction, removed him from office. A man sensitive by nature, of purest intention and noblest purpose, who had done all in his power not to stem nor to retard, but rather to aid in every way possible the reconstruction and a restoration of fraternal relations between the people of all sections of the country, this summary and unjust exercise of power wounded his feelings and greatly humiliated him. To such a degree, indeed, that he concluded to withdraw to his farm, where he remained for nearly three years. But when Coke became Governor, he would not longer permit this retirement, but called Judge Gould, his warm

personal friend, to the position of associate justice of the Supreme Court, which position he accepted. He was elected to the place in 1876. Five years thereafter he was appointed chief justice of the court. His term on the bench had not expired when he was asked to become one of the faculty of the Law Department of the University of Texas. He thereupon retired from the bench and entered heartily upon his highest and most enduring life work. Great is our admiration for Judge Gould as a judge. His opinions are filled with learning, and he demonstrated highest ability and capacity for the duties of his high office; but, when he left the bench and entered the University of Texas, he did a work for the State which can never be forgotten. For to him and Governor Roberts are we indebted for the foundation work of the Law Department of our great University. And the success of the Law Department is perhaps in largest measure due to the constructive ability of Judge Gould. But not only so; through the University he came in close and intimate touch with the young manhood of our State, and not one of the members of our bar who attended the State University but that has felt and will ever continue to feel the impress upon the character made by Judge Gould. The students held him in high esteem —almost in reverence. To them he was "the grand old man." Influence never dies. Once set in motion, it continues its onward march forever. No man can weigh or estimate this subtle power. And, if this be true, who can estimate, or approximately estimate, the value of the life of Judge Gould to our great State. He lived to a good old age. In the springtime of life he sowed good seed. He lived to garner the harvest of fruit, and in the winter of life, when close upon the grave, he could enjoy the harvest. Long he labored and labored not in vain. Many his struggles, but the conflict only developed the truer manhood; sore the defeats, but out of each defeat he wrested victory, and at last laid down to sleep that sleep which knows its awakening in the great beyond. Peace be unto our brother lawyer, our valiant soldier, our loyal statesman, our great instructor, our true friend. In every Texan's heart is reared the monument to his memory, which will endure longer than any marble shaft, to tell the coming generations the noble life which he has lived.

ROBERT G. WEST.

Your committee adopt the words of Major W. M. Walton in presenting the resolutions adopted by the Austin bar on the death of Robert G. West to our Supreme Court, and embody his most eloquent words, this high and deserved tribute in our report.

To the Supreme Court of Texas:

In the history of the bar of which Robert G. West was a member there has never been a sadder death, nor so signal a deprivation of the brotherly association of a more valued, loved, and useful member. Without an enemy, and no existing cause for an enemy—in the meridian of life—in full suc-

cessful and profitable practice—the pride and admiration of his legal brethren—possessing the trust and confidence of all the courts, State and Federal—he was summoned from earth to the world beyond, through and by the inscrutable wisdom of an All-knowing and Merciful Providence; we are left to mourn, and to wonder; to doubt, to criticise, to reason on such an occurrence is not our privilege; we must cheerfully submit to what is, and give glory to God, our Father, and honor as far as we can honor the memory and virtues of the dead. And in this particular we are fortunately situated, because none knew him but who, in his life days, gave him love, honor, and praise, and what we say here in his honor and tender and loving remembrance of him will meet with the hearty approval of all men. The complaint has often been made that a worthy men has not met with his just dues in life, but was only treasured fully when dead, and only then by manifestations of public sorrow and the heaping of flowers on his grave; not so with brother Robert, for, while in life, men and women gave him the active praise, love, and honor that his unquestioned and undisputed honorable, virtuous, and approvable life deserved and merited.

We will speak of him as a man, because underlying the lawyer is the man, even as the soul and conscience color, ennoble, or degrade the body, the casket of the higher and nobler nature. It is taken to be true that no man is really and in truth a great lawyer in whom is not underlying conscientious principles of a noble nature—then of our dead brother we will speak as a man.

Duty to him was the soul of action. He regarded duty as the guiding star of his life.

His modesty was proverbial. He was not self-assertive, but retiring, gentle, waiting; he abided in the unconquerable nature of truth and right.

There could not live a man the possessor of more courtesy. In all ways, at all times, to all persons, the sunshine of courtesy was his companion, and he himself regarded it as one of the primal virtues, and, so regarding it, his uniform and all unvarying habit was to award it to all.

He was gentle, and, as his nature was, his life exemplified it; no one can say that ever from his lips issued a hard or ungentle word, much less can it be said that he was the author of any unjust act to any one, whether of high or low degree.

He was in no sense selfish, but generous to a fault, where it did not infringe on the domain of duty. With him duty was first, an imperative guide and master in all cases and under all circumstances, but generosity was a second nature of which he never lost sight.

Robert's nature was genial, humorous, pleasing, and social. His conscience void of offense, he was ever ready to contribute to the extent of his ability, and it was great, to give pleasure and happiness to others—at home, abroad, wherever his lot was cast.

His domestic life was a model; wife and children constituted his earthly paradise. There he was the head, the protector, the careful, the broad and

abundant provider—the maker of content, the giver of joy, and the cause of happiness. There love surrounded him, and he was the creator of the orbit in which the domestic circle revolved about and around him.

He was a Christian gentleman, and in his heart and soul lived all the Christian virtues—mercy, love, charity, meekness, justice—and with all abundant reverence for the awful sublimity, power, and omniscience of God, the ruler of heaven and earth, the final judge for time and eternity.

His life as a whole and in detail was one that honest and honorable men might pattern after with unmovable confidence, that in doing so the best in their nature would bear fruit that would influence and elevate their lives to a better, nobler, purer, and higher level.

We speak of him as a lawyer—a calling which, if honestly and conscientiously followed and practiced, is one of the noblest, most honorable, humane, and public weal serving, to which a man can devote his time, labor, and ability, but at the same time can be made by little, narrow, and mean minds and natures an instrument of fraud, oppression, and unjust gain. But our brother, as we have shown, was a noble man, of generous and virtuous soul, and therefore was a lawyer that the best of citizenship could and did approve and applaud, and such professional life was his from the rising of its sun until it sunk into the sadness and misfortune of his death.

In his high appreciation of the great principles of the law, he had no tolerance for the shyster, who, with selfish ends in view, seeks to divert the grandness of the law from its true and only legitimate object and purpose—the promotion of justice, truth, and right. Such men he regarded, as they deserve to be regarded by all true lawyers, as legal scavengers and blots on the profession. Could his standard of legal ethics be upheld and enforced, the noble character of the calling would be restored, and not be blackened here and there and only too frequently by the disreputable practices of the drummer system of getting cases—runners to the scenes of accidents, and promoters of perjury, to win unjust and unmeritorious causes. Men who stoop to such unprofessional conduct should be not only scorned, but promptly expelled from association with honorable and upright men. Robert West was not one of these, and had no professional association or sympathy with them. He was an honest, honorable man, and a true and upright lawyer. His plane of practice was high; seeking no mean, little, narrow cuts or sharp practice advantages. He was disqualified by the texture of his mind, by the honesty of his heart, by his clean conscience, by every instinct and aspiration of his nature to take or have connection with disreputable methods in the pursuit of his professional life. He lived in the light of the law—reasoned with the law—and drew from the law logical conclusions that meant and were right and justice on the facts, out of which the law grew and governed. He met his adversaries in a brave and bold, manly manner. He fought in the open, under a banner

that had no stain on it and could have no stain on it while it floated over him.

He came from great lawyers and judges on both paternal and maternal side, and was worthy of his distinguished ancestry, and, had his life been spared to good ripe age, his achievements and reputation in legal history would have been a beacon light to guide, instruct, and encourage the generations of lawyers to follow him.

For weeks and months with "clear sight and calm courage he looked into his open grave," and through its dark depths and gloomy shadows he saw the hosts of immortals on the other shore, foremost of whom was his mother, whom he loved so well, and whose memory he cherished with ever-increasing tenderness—all with open arms and beckoning hands, bidding him to come. Such was his language to your speaker only a little while before he took his departure. He was not afraid of death, and died as if falling into restful sleep. He quitted life as he had lived it—a strong, brave man, and now exempt from the toils, temptations, disappointments, and burdens of this life, he rests in peace.

Such was Robert West.

J. Z. H. SCOTT, LEO N. LEVI.

For years the firm of Scott and Levi held high position in the profession; the members of the firm each the highest type of the ideal lawyer. During this year they both passed away, the one in the city of Galveston, the other in New York. Of J. Z. H. Scott, his friend and admirer Mr. James B. Stubbs pens a few lines, written in great haste, and of Leo N. Levi, Judge Kittrell, who knew him well and loved him much, soon after the news of his death wrote a very brief but beautiful memoir and your committee adopt these memoirs and make them part of its report.

J. Z. H. Scott, of Galveston, died January 18, 1904, at the age of 60 years, in the acme of his powers and usefulness. He was for more than twenty-five years a member, first of the firm of Flournoy & Scott, in which the distinguished Leo N. Levi was afterwards a partner. When Col. Geo. Flournoy, a former Attorney-General of Texas, moved to California, the firm became Scott & Levi, and after the latter moved to New York in 1899, Hon. Frank M. Spencer and Mr. Scott formed a partnership continuing until the former was appointed district judge. Amid such associates J. Z. H. Scott bore well his part. His learning was profound and accurate. No practitioner was more careful and painstaking, and his career was a practical demonstration that industry deserves and reaps the rewards of honor and success. Strict and conscientious to a fault, he always promptly and generously recognized the rights and merits of others. In many respects he was the fitting complement of the splendid lawyers who were his partners. His were rather the functions of the

thorough solicitor, theirs those of the barrister. And yet, as an advocate at the bar, and when alone, he was equal to the most exacting occasion, and was unusually successful. He was a gallant cavalryman under Stuart and Lee in the Army of Northern Virginia. So deep and earnest were his convictions that it was often said of him that he was never reconstructed and never would be. Perhaps he was too intense for the New South, if there be such a thing, but those of the Old South can not but love and honor such a character and such devotion.

After Galveston's great misfortune four years since, he took a most active part in the work of restoration, and especially in the establishment and operation of a most effective and satisfactory system of municipal government and finance. He was the law adviser of the desolated city and with constructive and executive ability did much to, in part at least, repair the desolations of her past.

A good man, a true Christian, a useful citizen, a noble lawyer has gone into the silent land.

The recent death of Leo N. Levi, formerly of Galveston, but for several years past a resident of New York, was a distressing shock to his myriad friends, not only in Texas, but in many other States. He was in point of ability, culture, and influence among the leaders of Jewish thought, not only in the United States, but in the world.

His intellectual equipment was of the very highest order, and he was, not only a profound thinker and graceful and forceful writer, but possessed all the graces of a polished and pleasing orator—a rare combination of gifts. As a trial lawyer he had few superiors, not only because of his knowledge of legal principles and his familiarity with the decisions, but because of his tact and courtesy and honorable deportment at the bar.

It is generally understood that he was the author of the memorial prepared for presentation to the czar of Russia concerning the Jews of Kishenev, a paper that showed the work of a master mind.

He was familiar, not only with Jewish history, religion, tradition, and literature, but with all branches of general learning.

He was a charming companion, genial, warm-hearted, courteous and kind.

Stricken down ere the sun of a splendid manhood had reached its noon, the legal profession, society, the Jewish race, and his country suffered a grievous loss, and the death of few private citizens has ever caused more widespread or deeper sorrow.

He was a broad-gauged, strong, manly man, and, take him all in all, we shall not soon look upon his like again. Texas claimed him as her son and deeply mourns her great loss.

MR. WATKINS: Your committee to nominate delegates to the St. Louis Congress of Lawyers submit the following report:

To T. S. Reese, President Texas Bar Association:

Your committee nominates the following gentlemen as delegates to the Universal Congress of Lawyers. We have named one gentleman from each Court of Civil Appeals. We understand that the judges of the courts of last resort are ex-officio members of the congress. We recommend that the Secretary of the Association shall learn from each delegate if he will surely attend the congress, and, if he will not, that the President of the Association, to be elected at this meeting, shall appoint some one who will go to take his place. The names we have selected for nomination as such delegates are: W. L. Crawford, Yancey Lewis, H. C. Carter, R. A. Pleasants, John H. James, A. E. Wilkinson, J. W. Terry, W. W. Searcy, Rhodes Baker, W. H. Burgess, Jno. C. Townes, A. L. Beaty, Ocie Speer, W. M. Key, Anson Rainey, Clarence Miller.

Respectfully submitted,

EDGAR WATKINS.
F. C. DILLARD.
JAMES E. HILL.
L. R. BRYAN.

It was moved and carried that the report of the committee be received and adopted, the members named selected as delegates to the Congress of Lawyers, and the power to fill vacancies by the President, recommended in the committee's report, be conferred upon him.

THE PRESIDENT: The next order of proceeding, gentlemen, is a paper by Judge Fisher, entitled "Needed Amendments to the Probate Law."

[The paper, read by Judge Fisher, will be found in the Appendix.]

Mr. Hildebrand, from the Committee on Judicial Administration and Remedial Procedure, presented the following report which, on motion, was received and filed:

To Hon. T. S. Reese, President Texas Bar Association:

As your committee could not cover all subjects, we recommend the adoption of the suggestions made by the committee specially appointed for the purpose and presented in the report made to the Association this day by Judge Brooks on behalf of that committee, and also those in the paper of Judge Fisher just now read, and which was agreed upon by the members of your committee having this part in charge.

Respectfully submitted,

IRA P. HILDEBRAND,
For Committee.

The President announced the appointment of the following committees:

Committee provided by the resolution by Mr. Ewing offering amendment to the law requiring unanimity of jury in civil cases: Presley K. Ewing, Houston; Sidney J. Brooks, San Antonio; L. W. Moore, La Grange; B. D. Tarlton, Fort Worth.

Committee on resolution by Mr. Davis and Mr. Ewing with regard to organizing county bar associations: M. W. Davis, San Antonio; Amos L. Beaty, Sherman; L. R. Bryan, Houston; W. C. Wear, Hillsboro; W. H. Allen, Terrell.

THE PRESIDENT: The next thing in order is the election of officers for the Association.

Mr. A. L. Beaty, of Sherman, placed in nomination Mr. H. C. Carter, of San Antonio, for President. No other nominations being made, Mr. Rhodes Baker moved that the nominations for President be closed and that the Secretary be directed to cast the unanimous ballot of the Association for Mr. Carter's election. The motion prevailed, and Mr. Carter, upon such ballot, was declared the new President of the Association.

President Carter being called for, and not being in the hall, the Chairman appointed Messrs. Beaty and Baker a committee to apprise him of his election and to escort him to the chair. Mr. Carter having appeared, conducted by the committee:

PRESIDENT REESE: *Gentlemen of the Association:* In laying down the office as President of this body, permit me to say that I shall always cherish, along with a deep sense of the honor which was done me in my selection to preside over this body, a grateful remembrance of the kindness, courtesy, and forbearance with which my shortcomings as a presiding officer have been treated by its members. I have now the honor and pleasure of introducing to you the new President of the Texas Bar Association, Mr. H. C. Carter, of San Antonio, and of resigning to him the conduct of your deliberations.

Mr. Carter, in some appropriate remarks, which the stenographers failed to preserve, returned his thanks and expressed his appreciation of the honor done him.

PRESIDENT CARTER: The next thing in the order of business is the election of Vice-President.

MR. MOORE, of La Grange: I place in nomination for Vice-President the name of Mr. H. M. Garwood, of Houston.

MR. MILLER: I second the nomination.

MR. MILLER: There being no other names placed in nomination, I move that nominations be closed, and that the Secretary be directed to cast the ballot of the Association for the election of Mr. Garwood as Vice-President.

The motion was unanimously carried, and on ballot Mr. Garwood was declared elected to the office of Vice-President.

THE PRESIDENT: The next order of business will be selection of a Secretary.

On motion of Mr. Spoonts, the name of Mr. A. E. Wilkinson was placed in nomination for re-election to the office of Secretary of the Association, and, no other nominations being made, on ballot cast by direction of the Association, he was declared elected.

On nomination, there being no other names suggested, Mr. Wm. D. Williams was re-elected Treasurer of the Association by unanimous ballot cast by the Secretary under direction.

THE PRESIDENT: The next order of business is the election of Directors.

MR. JAS. A. BAKER: I take pleasure in placing before this board the names of A. L. Beaty, E. F. Harris, W. H. Burgess, R. E. L. Saner, and Edgar Watkins.

A MEMBER: I move that the nominations be closed, and the Secretary be instructed to cast the ballot.

The motion prevailed, and the Directors named were elected.

THE PRESIDENT: The next thing in our order of business is the election of delegates to the American Bar Association.

The following names were placed in nomination, and, on motion duly seconded, were elected by acclamation: William Pearson, Greenville; R. E. L. Saner, Dallas; T. H. Franklin, San Antonio; W. H. Allen, Terrell; Edgar Watkins, Houston; C. F. Greenwood, Hillsboro.

PRESIDENT CARTER: The next order of business is the selection of a place where we will hold the next meeting.

MR. DILLARD, of Sherman: *Mr. President:* You have here on the southern border of this great State two cities which might be termed twin cities

of South Texas. Houston and Galveston are the bright gems of your fair southern clime. Both of them have been honored with the annual conventions of this great body. We know the hospitality of your people. We, too, have two fair cities that might be termed the twin towns of North Texas. They may not be so large as your cities, but they are capable of extending as great a hospitality and they have people with as big hearts as may be found here. I wish to tender, in the name of the Grayson county bar, our cordial invitation to hold the next meeting of the Association with us. It is probable that the accommodations which we shall tender you for holding your sessions will be selected at Woodlake, midway between the two places, upon the electric line; but, since it is necessary to name a town in making this selection, I nominate Sherman as the place of our next meeting, and move you that it be chosen for that purpose.

MR. SPOONTS, of Fort Worth: *Mr. President:* I was asked by the bar of Tarrant county to invite the Association to hold its next annual convention in the city of Fort Worth. I have always, however, had the kindliest feeling for the little fellow who was trying to be somebody, and I wish to second the nomination of Sherman. I do this with the understanding that Fort Worth will expect the convention next time.

Mr. Burgess, in adding his second to the nomination of Sherman, said:

And I want to say to Judge Dillard that we will contest with Fort Worth the honor of having the convention with us at El Paso next time.

The motion was carried.

MR. BRYAN: I offer a resolution upon a subject that has been before this Association for eight years; it has been the subject of several exhaustive and very able reports; it is a matter upon which every member no doubt has a fixed opinion, and we are all prepared to dispose of it; I refer to the Torrens system of registry, and I offer the following resolution:

WHEREAS, The committee's report on the merits of the Torrens system of registration of title to land was published in the minutes of this Association in 1897 (pp. 26-33), again read in the sessions of 1898 and 1899, and no action taken because this reform law was then on trial in Illinois and Massachusetts; and the committee at our meeting in 1900 made an additional report showing the working of the system in said States accompanied with a letter of Hon. Leonard A. Jones, judge of the court of land registration of Massachusetts, and Associate Judge Davis of the same court; and in 1901 this Association took no further action than to order the amended report printed in the minutes. In 1902 the Committee on Jurisprudence and Law Reform (by Judge Reese, one of the committee who reported on the merits of this system in 1897) in their report recommended

that this system should be adopted; and at the last meeting of this Association, by resolution, we had printed in our minutes a bill prepared by James E. Hill based on the Massachusetts law (which has proved a success) modified as required so as to be applicable to the laws of Texas; therefore,

Resolved, That we believe the reform proposed meets with our approval, and we call upon the next Legislature of this State to give due and careful consideration to this system and enact a law in line therewith.

A MEMBER: I move the adoption of the report.

JUDGE REESE: I second the motion that the resolution read by Mr. Bryan be adopted.

The motion prevailed.

JUDGE REESE: It is exceedingly gratifying to every member of this Association that the Bar Association seems to have emerged from the semimoribund condition that existed for several years; it seems now that the Bar Association is on the up grade, and that it is in a condition, by continual growth on the part of its members, to accomplish something of the tremendous work in the State of Texas, and for the lawyers to fetch people to the State. The moving impulse of this Association is in the betterment of the laws and not in the interest of the lawyers, recognizing that we stand as sentinels on the watch tower; and, with the duty before us of seeing whether the laws need amendment in the interest of the people, we have accepted the office, and I trust now that the Association will continue to gather new members, and that people will be brought to recognize that no matter what may be said with regard to other associations that here their interests are consulted.

Now, gentlemen, much of this successful meeting is due to the local bar of the city of Houston; they have placed their standard high, and all the other local bar associations will have much to do to come up to the standard that has been set by the local bar, and it is a source of pride to me that for even two years I was a member of this bar. I move that the sincere and hearty thanks of this Association be extended to the Houston, Harris county, Bar Association for the entertainment they have afforded us.

MR. ALLEN, of Terrell: I second that motion.

JUDGE TARLETON: I move to amend that motion by adding thanks to the members of the press association for the able manner in recording the reports of the proceedings of this convention.

The amendment was accepted by Mr. Reese.

THE PRESIDENT: It is moved and seconded that the hearty thanks of this Texas Bar Association be extended to the bar of Harris county, Texas, and to the newspapers for the splendid manner in which we have been entertained and the able reports furnished by the press.

The motion prevailed.

JUDGE SIMKINS: I desire to call the attention of the Bar Association to this fact: I think we are drifting from the purpose of this Association; I wish to suggest to the Association certain things which I think we ought to undertake to do; we have too many papers that are occupying our time, and when they are read we are not ready to discuss them; I suggest to the Bar Association that we have only six regular papers read, and if we have time we will hear volunteer papers.

JUDGE REESE: That is already provided by the By-Laws.

JUDGE SIMKINS: Then I move that hereafter this Association, until it has disposed of all of the business as reported by the various committees, will not hear over six papers.

JUDGE REESE: I agree with what has been said by Judge Simkins, but we must absolve the Board of Directors of all blame. I think the By-Laws should be strictly complied with, and that the papers should be limited to six.

MR. GARWOOD: At this meeting there have been read seven papers, exclusive of the annual address; it is true the By-Laws provide only for the reading of six; but I take it this Association has been extremely fortunate that it has gotten to seven; for my part I believe that these papers—masterful papers—are the very links that bind us to the ideals of our profession; I believe they are the most useful parts of this organization, and I believe this meeting ought not to go on record as discouraging these papers.

JUDGE SPOONTS: I endorse what Judge Garwood has said.

MR. DILLARD: I move that the resolution and amendment be laid on the table.

The motion was duly seconded, and the resolutions were tabled.

Mr. Bryan moved the adjournment of the Association (which was duly seconded), and the motion prevailed.

THE BANQUET.

[From the Houston Post.]

The banquet tendered to the visiting members of the Bar Association last evening by the local bar proved most successful, far surpassing in brilliancy the most sanguine expectations of the givers.

A more brilliant assemblage of representative Texans has seldom gathered in this city, and the successful banquet of last evening only added to the excellent and interesting meeting which for the past two days has been in session at Turner Hall.

The great dancing hall of the club had been turned into an enormous dining hall, and, with the profusion of flowers and palms, made a most pleasing and beautiful appearance.

Diehl & Schrams' orchestra rendered the musical numbers, which, at times, elicited much applause.

The festivities were opened by a short talk by Captain James A. Baker, toastmaster.

The toasts were all accorded much applause, especially Hon. Yancey Lewis', "Our Profession."

Following are the toasts as given:

"Our Profession," Hon. Yancey Lewis.

> "Of law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world."—*Hooker.*

"The State Judiciary," Judge T. J. Brown.

> "I know you lawyers can with ease,
> Twist words and meanings as you please."—*Gray.*

"The Country Lawyer," Judge B. D. Tarlton.

> "The charge is prepared, the lawyers are met,
> The judges all ranged; a terrible show."
> *"The Beggars" Opera* (Gay).

"The Texas Bar Association," Hon. M. A. Spoonts.

> "As long as your profession retains its character for learning, the right will be defended; as long as it preserves itself pure and incorruptible on other occasions not connected with your profession, those talents will never be used to public injury which were intended and nurtured for the public good."—*Sidney Smith.*

"The Court, the Criminal, and the Public," Judge M. M. Brooks.

"No man e'er felt the halter draw
With good opinion of the law."—*Trumbull.*

"Legal Education," Colonel W. L. Prather.

"A little learning is a dangerous thing."—*Pope.*

"The Lawyer Statesman," Hon. R. L. Henry.

"Who, born for the universe, narrowed his mind,
And to party gave up what was meant for mankind."—*Goldsmith.*

"The Federal Judiciary," Hon. J. B. Dibrell.

"The peace, the prosperity, and the very existence of the Union are vested in the judiciary."—*De Tocqueville.*

"Women at the Bar," Hon. John M. Duncan.

"Seek to be good, but aim not to be great,
A woman's noblest station is Retreat."—*Lord Lytton.*

"HOME, SWEET HOME."

"So comes the reckoning when the banquet's o'er—
A dreadful reckoning and men smile no more."—*Gray.*

THE MENU.

Caviar Canape.

Celery. Salted Almonds. Olives Farcie.

Consomme en Tasse. Haut Sauterne.

"Drink no longer water, but use a little wine for thy stomach's sake."—I Timothy v, 23.

Fillet of Trout, Tartar Sauce.

Ressollie Potatoes.

Fried Chicken, Cream Sauce.

French Peas.

Chauteau Bouliac.

"Good liquor, I stoutly maintain, gives genius a better discerning."—*Goldsmith.*

Soft Shell Crabs, Tartar Sauce.

"Uneasy crawls the crab when sharks begin to dine."—*Persian Proverb.*

Chilled Tomatoes a la Mayonnaise.

Cheese. Crackers.

Mumm's Extra Dry.

"Like the best wine . . . that goeth down sweetly, causing the lips of those that are asleep to speak."—*The Song of Solomon,* vii, 9.

Assorted Cakes. Biscuit Glace.

Cafe Royal. Fruit.

"Claret is the liquor for boys; port for men; but he who aspires to be a hero must drink brandy."—*Samuel Johnson.*

A reporter, detailed to take down for the Association the responses to the toasts, succeeded only in preserving the first and second, that of Judge Lewis and that of Justice Brown, which were as follows:

OUR PROFESSION.

JUDGE YANCEY LEWIS.

Mr. Toastmaster and Gentlemen of the Bar Association:

A distinguished citizen of Houston, whose achievements in the financial and industrial world have been followed by us all with interest, in a recent address, admirable for its breadth and practical suggestiveness, emphasized the dominance of the business class with the remark that even the lawyer was coming to be little more than a head clerk to a business man. Having known this gentleman when both of us were youth's free companions of fortunes, when both were upon the even plane of an equal impecuniosity, when the utmost scope and verge of our forecast for the future comprehended no more than placating our landlady for the ensuing week, I naturally took this remark as a personal reflection and resolved at the first opportunity to tell the capitalistic class some plain truths, desirable for them to know. Our profession distinctly approves of the captains of industry—and of its non-commissioned officers and its privates. We need them all in our business. Our frame of mind is akin to that of the Indians whom the government was anxious to have taught agriculture. Instructors plowed and harrowed and planted and explained to the hand-painted children of nature as they sat on their piebald ponies and gravely watched operations. But at the suggestion that they take a hand the chief grunted: "Ugh, heap good, keep it up, keep it up," and the band rode away in lofty disdain. Let the strenuous man of business pile up his enormous fortune; our profession will hold impartial inquest over his estate. Let him fret and fume and bring on paresis; the members of our profession will watch his performance with sympathetic philosophy and reverently recall the words of the hymn: "I gather them in, I gather them in." But in truth your business man only imagines that he is doing great things. He furnishes the noise and bluster and the vulgar capital, but in the background a member of our profession is furnishing gray matter and direction. Your man of enterprise dares not lift a finger without our consent. He does not spend a dollar against our command. They are our pawns upon life's chessboard, and are moved by our skill and guarded by our vigilance. They are our children and we fond parents, who let them play at great enterprises and enter upon vast undertakings, but always keep them within careful limits and let them have only such development as is good for them, and clear of the penitentiary. True,

we allow them to have their names at the front and to take the credit of the resounding performance, but let not your capitalist get gay and cocky and indulge false imaginings on this account. Never has it been beyond the range of possibility for members of our profession to play modest and retiring parts—for a sufficient consideration.

Gentlemen, in responding to the toast, I shall not indulge in unprofessional boasting. I scorn idle vaunting. Speaking words of soberness and thus keeping en rapport with the occasion, I will simply say, as one would state a cold scientific fact, that our profession is the crown and consummation, the flower and perfected fruit, of all other professions, callings, vocations, labors, and achievements of humanity; that from all these it draws to itself whatever is enlightening, elevating, broadening, strengthening, and ennobling, and, incidentally, a large part of what is pecuniarily valuable. Consider us in relation to the medical fraternity. The medical profession is an honorable profession. Its members mean well. They generally outlive their mistakes. They profit by their errors. They rise on stepping stones of their dead patients to higher charges. Yet, gentlemen, we have won honors in the province which that profession claims as peculiarly its own. We have discovered forms and kinds of insanity which the doctors never even heard of. We have shown men to suffer from gross, palpable, dangerous, man-killing insanity, of which the alienists, with all their tests and paraphernalia, could find no trace. If the doctors are the discoverers, may not members of our profession justly, if not proudly, claim to be the inventors of the railway spine? Daily we demonstrate by the unimpeachable verity of the judgment, to the satisfaction of court and jury and to the ineffable satisfaction of the client, that he suffers from incurable maladies and immedicable wounds and injuries, totally unsymptomatic to the dull diagnosis of the doctors. We enter the domain of the psychologist—the gentleman who wraps himself in the dignity of a long name and deals with faculties, emotions and their interplay. We weigh emotions, put grief up in packages, capitalize tears, and perform the feat unprecedented of measuring in round numbers of dollars and cents the exact amount of mental anguish a man feels when, through the remisness of a telegraph company, he is deprived of the pleasure of attending his mother-in-law's funeral.

Sometimes we combine something of the functions of the physician and the minister of the Gospel. Men burn with the fever of litigation; we bleed them. They come to us contentious, overbearing, exacting; when they have paid our fee and the court costs, they go away charitable, considerate, forbearing, disposed to concessions. The trusts fall out, forget how profitable it is for brethren to dwell together in unity, disregard gentlemen's agreements, and engage in coarse competition; a member of our profession composes their differences, enables them to mark up prices to such extent that their very quarrel bears interest, charges a fee which, however large,

is covered by the advance, and thus makes plain to his clients and himself the beauty of the utterance: "Blessed are the peacemakers." A corporate enterprise illustrates the dread ravages of wind and water; we receive it into a hospitable receivership and make good the words: "From him that hath not shall be taken even that which he hath."

Ours is a patient profession. Recall how we bear with the judges. How often, after our most luminous efforts have made plain the path, do they persist in going into devious ways; yet always we keep in mind the music hall placard and remember that the judges are doing the best they can. When their incurable propensity for erring in our cases induces a disposition to speak of them as asses and wooden-heads, we exhibit a fine restraint, not overlooking that an admiring constituency is liable at any time to perceive in us all the qualifications for judicial office.

Ours is a broad and catholic profession. We are the courtiers of the Grand Dame; we are the advisers, shall I not say the guardians, of the captains of industry; we are the champions of the plain people; we are cheek by jowl with the horny-handed sons of toil; we are on familiar terms with practitioners at other bars than our own; we touch elbows with all sorts and conditions of life; we surpass in actual experiences anything in the realism of Dickens, and in the domain of pure fiction all men testify that the volume and quality of our product puts the common herd of novelists to shame. There is no narrow range to our sympathies. We have attachments for men, women, and children; and, like the rains of heaven, our levies fall alike upon the just and the unjust.

Withal, ours is a progressive profession. We hook on to the automobile of progress. We turn on the electric light of civilization. We will, if necessary, use the X-ray to discover the reason in our appellate court decisions. We make our law books like men make bricks—by machinery. Doubtless even now some member of our brotherhood is running shears and typewriter under a full head of steam and using every facility, except brains, with a view to bringing out "The Law of Aerial Navigation."

But, gentlemen, in its heart of hearts our profession loves justice and ever seeks it; is sensitive to the rights of man, and labors to safeguard them; desires the general good, and gives much of its time and thought to promote it. Because of these things, above all the works of men, the works of our profession endure. Do we not know that kings and presidents pass and are forgotten, but that Mansfield and Hardwicke and Eldon and their compeers still rule in the affairs of life, still sit in the judgment seats in the northern hemisphere and in the southern seas, still decide causes and enter decrees? Do we not know that today the voice of the dead Marshall is more potent than the voices of all living men in the

practical conduct of the national government? In this connection I draw from a recent address by another a noble thought. The Emperor Justinian ruled the civilized world and designed for himself a memorial which should surpass the dreams of artists and defy the ravages of time. Justinian's empire has vanished; the language of his people is unspoken; his gorgeous memorial has left no trace, but, happily for his fame, he organized a commission of lawyers who framed the code that bears his name, and, because of this, millions throughout the earth acknowledge his sway, revere his memory, and regard his code of laws as the mightiest force that survived the ancient world. Something more than a century ago Napoleon rose above the horizon of Europe with the effulgence of another sun. His achievements take away the glamour from the fairy tales of our childhood; yet he died upon a rock of the ocean, his empire broke into fragments, and his scepter passed to an unlineal hand. But he linked his name to a code of laws more enduring than his rule, and this code remains the imperishable if not the sole monument of his greatness. To take an illustration more immediately pertinent, I spoke of Marshall's influence in the government. We are aware that in most of the causes in which Marshall rendered his great judgments, Mr. Webster appeared as counsel on the side that prevailed. We can never know to what extent he influenced the opinions of the court, but at least it is more than a figure of speech to say that it may be by Webster, not as senator or cabinet officer, but simply as lawyer, that at this hour great powers of government are apportioned, mighty policies of finance established, armies and navies moved, and far-off peoples ruled.

Let no man believe that our work is done, and that henceforth we shall simply furnish head clerks to business men. Our profession shall continue to direct and guide all institutional, social, and economic forces that make for progress and through which men work out human destiny. Like the laws of nature in the physical world, the functions of our profession still shall be to keep all advancement, all development, all newer forces in place and order. Like the sun, it must give forth light and produce healthy life, or there can be in the noblest sense neither light nor life.

Let us indulge no misgivings, my brothers. Let us keep the old faith. Our profession is here to stay. We are as inevitable as taxes; we are as taking as the measles; we have the enduring popularity of the tax collector and the undertaker.

In response to the toast "Our State Judiciary," Justice T. J. Brown, of the Supreme Court, spoke as follows:

OUR STATE JUDICIARY.

JUSTICE BROWN.

Mr. Toastmaster and Gentlemen:

I appreciate the privilege of responding to the sentiment, "Our State Judiciary." My connection with the courts and bar of Texas began more than fifty years ago as deputy clerk of the district court of Washington county, at which time I came into contact with judges and lawyers who were at the birth of the Republic, aided in framing our first State Constitution and in developing our judicial system. They were learned men, with high professional ideals and of honorable practices. I was fortunate in having the benefit of such influences, which impressed me with profound regard for the courts and the bar. Looking back over fifty years of my life, the kind, magnanimous, and courteous treatment accorded to me in my days of trial by the lawyers, and continued to the present, come forth from memory's storehouse as a sweet consolation to my age. With anxious thought for the future of Texas in all her departments, I turn to the present and find a great number of younger lawyers whose learning and high professional character give the comforting assurance that the standard of our courts and of our profession will be well maintained in the future.

The courts and the bar are mutually dependent upon each other. The judge must depend largely upon the lawyers for aid in solving legal problems, and for that moral support which counts for so much in preserving the dignity and decorum of legal proceedings. Lawyers depend upon the judge for the courteous, respectful, and impartial bearing that tends to elevate the standard of the profession and promote the administration of justice. Lawyers are both officers and friends of the court.

The district court is the corner-stone of our judicial system. Its ample jurisdiction embraces the most important controversies which involve the property, liberty, and life of the citizen. In that court, the facts upon which the disputed right depends must be ascertained, and the record there made limits the exercise of revisory power by the appellate courts. Its judgments are supported by presumptions of correctness which answer every challenge that is not sustained by the record.

The district judge is the most important officer of the State government. He is invested with power and charged with duties that concern the everyday life of the people, and he should be honest and impartial. The district judge should be learned in the law; he must decide upon the instant grave questions that will require hours, even days, for examination by the appellate courts. The district judge should be courageous and independent; he is, so to speak, upon the firing line, the object of all personal feeling engendered by a trial, and oftentimes is in contact with inflamed public opinion and must face the alternative of risking his official life at the next

election or abandon the weak and defenseless party to secure the favor of the strong.

Notwithstanding the great importance of that court, it has not received the consideration it deserves. Charged with the most important duties and subjected to the greatest labor, the judges are paid the meager sum of $2500 per year. The term of office of four years brings them into too frequent contact with the machinery of party politics. The salary should be increased and the term of office extended to not less than eight years.

The judges of the former Supreme Court labored faithfully and decided many cases, but its business increased until the court was many years behind its docket, which resulted, oftentimes, in delaying cases so long that when decided, the subject of litigation was not worth the costs of court. To remedy this evil, the Courts of Civil Appeals were organized with the same jurisdiction and procedure in each court as was vested in and exercised by the Supreme Court. Practically, five Supreme Courts with fifteen judges were organized to do the work previously imposed upon one court with three judges. In the Courts of Civil Appeals, litigants have all of the benefits of the judicial powers and remedies which could have been invoked under the old system in the Supreme Court. Dispatch of business was, by this arrangement, accomplished, for no one now complains of delay in the Courts of Civil Appeals. Those courts are practically up with their business and have at no time been greatly behind in their work. The work of reform might have stopped here except that with so many courts of last resort and of equal dignity, conflict of decisions would necessarily occur, and to overcome this difficulty, the present Supreme Court was created, with appellate jurisdiction in matters of law only over the Courts of Civil Appeals whereby uniformity of decision might be preserved and errors of law corrected. If conflicts in the decisions of the Courts of Civil Appeals have occurred and have not been reconciled, the purpose for which the Supreme Court was created has not been accomplished.

An attorney asked me this question: "What will you do with the conflicts in the decisions of the Courts of Civil Appeals?" I will answer the question by calling your attention to the law and stating the facts. In the first place, the number of conflicting decisions is greatly exaggerated. The law gives to the losing party the right to have a writ of error granted in any case of which the Supreme Court has jurisdiction when the opinion of the Court of Civil Appeals is in conflict with the opinion of another Court of Civil Appeals or of the Supreme Court. We may safely assume that no lawyer who has lost his client's case in a Court of Civil Appeals will fail to apply for a writ of error to the Supreme Court, which he may have as a matter of right. Therefore, the number of applications which have been granted by the Supreme Court on the ground of conflict of decision fairly represents the whole number of conflicts which have existed. There may be a few cases in which applications have not been made. The Supreme Court, since its organization, has passed upon nearly four thou-

sand, five hundred applications, and have granted, on the ground of conflict of decision, not exceeding fifty. When we consider the number of cases decided by the Courts of Civil Appeals which have not been presented to the Supreme Court on applications, the number of fifty conflicts, if so many in fact have occurred, would not form a just ground of complaint against the work of those courts. In addition to the remedy given by application for a writ of error, the law provides that either party to a case decided in a Court of Civil Appeals may have any question upon which that court in the opinion delivered is in conflict with another Court of Civil Appeals, or with the Supreme Court, certified to the Supreme Court for decision, whether the latter court would have jurisdiction to grant a writ of error or not. This is the simplest method of reconciling the conflicting decisions of the appellate courts that could be devised, and, in my opinion, completely answers the objection which has been made to the present system on that ground. If all of the conflicts which have occurred have not been settled heretofore, it is because the attorneys did not avail themselves of the simple remedies provided by law. If they have been settled, then there is no ground of complaint left.

An examination of the reports of similar courts in other States will show that our Courts of Civil Appeals have performed as much labor as like courts of any other State, and their work will compare most favorably with the work of such other courts for learning and careful investigation.

The Committee on Law Reform recommended to the Bar Association of Texas the enactment of a law which would so limit the jurisdiction of the Supreme Court as to enable that court to read the opinions of the Courts of Civil Appeals and the applications for writs of error, and to examine the same. This implies that for want of time the Supreme Court of this State has refused applications for writs of error presented to it without reading the opinions and without an examination of the application. Coming from such a source, the lawyers of Texas have the right to regard the statement as being based upon a knowledge of the facts, and having been present myself when the report was presented, my silence might be construed as an acknowledgment of its correctness. I, therefore, make the following statement for the information of the lawyers of Texas upon this subject. Since I have had the honor to be a member of the Supreme Court, more than four thousand applications have been passed upon and not one of them has been refused except upon an examination of every assignment presented therein by all of the judges sitting and acting together, unless one of the judges might have been absent or disqualified, in which case the other two, of course, would pass upon the application. I take the liberty to make the following statement of the manner in which the work of the Supreme Court in the examination of applications is performed: When an application is taken up, one of the judges reads aloud, in the hearing of the other two, the opinion of the Court of Civil Appeals, after which another member reads aloud the application, and each and every assign-

ment therein. During this time, the third member of the court has the brief of counsel for reference as may be necessary in the examination of the various assignments. If, however, an error is found which the court regards as authorizing the granting of the writ of error, the application is granted without further examination, which brings the whole case before the Supreme Court for examination and final hearing. If the judges have a serious doubt of the correctness of any ruling complained of in the application, the writ of error is granted, giving the benefit of the doubt in favor of the granting of the writ, or if one member of the court believes that the application should be granted, it is done. The majority of the court will not refuse a writ of error over the dissent of one of its members. This is a plain statement of the facts and the manner in which the Supreme Court transacts this business, which evidently were not known to the committee that made the report referred to.

I have been asked, "How can the Supreme Court perform so much work?" If the court were required to examine the records which are presented with the applications as the old Supreme Court was required to do, it would be impossible to perform the work, but in nine cases out of ten which are presented on application, the whole case which may be submitted to the Supreme Court is contained in the opinion of the Court of Civil Appeals and in the application for writ of error, together with the briefs of the attorneys. Remembering that only questions of law can be presented to the Supreme Court, and that the findings of fact made by the Courts of Civil Appeals are binding upon the Supreme Court, it can be readily understood that only in exceptional cases will it be required of the Supreme Court to look into the transcript, and in such instances a well prepared application will point out the page and line of the transcript to which it is necessary for the Supreme Court to refer. A well prepared opinion by a judge of a Court of Civil Appeals and a proper application for a writ of error will reduce a record of a thousand pages into a very narrow compass, so far as the Supreme Court is concerned, and this work done by the appellate court and by the counsel enables the Supreme Court to grasp and readily decide the points of law at issue. In a few cases, it has become necessary for the Supreme Court to examine with considerable care the transcript of the case. I believe this statement will enable attorneys to understand how the business of the Supreme Court may be so rapidly dispatched consistently with a faithful performance of its duties.

Embraced in our State judiciary is the honorable Court of Criminal Appeals, which has existed more than a quarter of a century, contemporaneously with the Supreme Court of the State. The judges of that court have been and are men of ability, faithful in the discharge of their duties, and careful in the performance of their work. It has been said that the conflicts between the decisions of the Supreme Court and of the Court of Criminal Appeals form a serious objection to the system as it now exists. In the presence of two of the learned judges of that tribunal I state that

during the existence of the two courts there have been but two conflicts in their decisions, so far as I am able to recall them. One occurred during the organization of the former Supreme Court and related to the power of a county court to foreclose an attachment lien upon real estate, and the other occurred during the existence of the courts as now organized and related to the authority of the Legislature to prescribe the manner of selecting certain officers of municipal corporations. In a case certified to the Supreme Court during its last term, that court followed without comment or question a decision of the Court of Criminal Appeals because it related to matters peculiarly within the jurisdiction of the latter court. In the course of litigation, similar questions arise in civil and criminal cases, and such questions are presented to both the Supreme Court and the Court of Criminal Appeals, and it has not been unfrequently the case that the judges of the two courts confer with each other upon this class of questions in order to maintain uniformity of decision and harmony.

In conclusion, permit me to say that in my opinion the judicial scheme which is outlined in our Constitution is capable of being adapted to the wants and needs of this State to a degree that no other system known to me can be. There are defects in the law organizing the different courts which can be cured by legislation, and our judicial system made better than it is, and, I believe, better than anything which has been suggested. I, therefore, suggest that it is wiser policy to perfect this system than to destroy it and try another experiment.

RULES OF THE SUPREME COURT.

PRESCRIBING A COURSE OF STUDY AND REGULATIONS GOVERNING THE MODE OF EXAMINATION FOR ADMISSION TO THE BAR.

In pursuance of an Act of the Twenty-eighth Legislature entitled "An Act to provide for and regulate the granting of license to practice as attorney and counsellor at law in all the courts of the State of Texas and to repeal all laws and parts of laws in conflict therewith," approved March 19, 1903, we, the undersigned Chief Justice and Associate Justices of the Supreme Court of the State of Texas, do hereby prescribe the following course of study to be pursued as a condition to admission to the bar, and the following rules to govern the Board of Legal Examiners in examining applicants as required by that act:

I.

Elements of the Common Law.

Blackstone's Commentaries, Vols. 1, 2 and 3.

II.

Real Property.

Tiedeman or Kent, Vol. 4.

Revised Statutes, Title XX, "Conveyances;" Title LXIII, "Landlord and Tenant;" Title CX, "Wills."

III.

Contract.

1. Anson or Clarke.
2. Sales—Tiffany.
3. Bills and Notes—Bigelow, Daniel or Story. Revised Statutes, Title XIII, "Bills, Notes, and other Written Instruments;" Title LXXXIV, "Principal and Surety."

4. Carriers—Hutchison. Revised Statutes, Title XIV, "Carriers."
5. Partnership—Mechem.
6. Corporations—Clarke.
7. Agency—Story.
8. Revised Statutes, Title L, "Frauds and Fraudulent Conveyances."

IV.

Torts.

1. Cooley.
2. Revised Statutes, Title LVII, "Injuries Resulting in Death;" Revised Statutes, Title XCIV, Chapter 12b, (Sayles) "Railroads."

V.

Equity Jurisprudence.

1. Bispham or Eaton.
2. Revised Statutes, Title LVI, "Injunction."

VI.

Pleading, Practice and Evidence.

1. Townes' Pleading.
2. Story's Equity Pleading; Revised Statutes, Title X, "Attachment and Garnishment;" Title XXVII, "Courts—Supreme, of Civil Appeals and Criminal Appeals;" Title XXVIII, "Courts—District;" Title XXIX, "Courts—County;" Title XXX, "Courts, District and County—Practice in;" Title XXXIII, "Courts—Justices;" Title C, "Sequestration;" Title CVI, "Trespass to Try Title;" Title CVII, "Trial of Right of Property."
3. Greenleaf's Evidence, especially Vol. 1.
4. Revised Statutes, Title XL, "Evidence, with Sayles' Notes."
5. Revised Statutes, Title LXVII, "Limitations."
6. Revised Statutes, Title XCIII, "Quo Warranto."

7. Rules of the Supreme Court for the government of that court, the Court of Criminal Appeals, the Courts of Civil Appeals and the trial courts.

VII.

Domestic Relations and Administration of Decedent's Estates.

2. Kent's Commentaries, Lectures XXVIII, XXIX, XXX, XXXI and XXXII; Revised Statutes, Title LV, "Husband and Wife;" Revised Statutes, Chapters 1, 4, 8, 9, 10, 12, 14, 18 of Title LI, "Guardian and Ward;" Revised Statutes, Articles 1867, 1869 and 1879 of Chapter 3, and Chapters 4, 5, 11, 12, 14, 17, 18, 19, 20, 22, 23, 25, 26, 28, of Title XXXIX, "Estates of Decedents;" Revised Statutes, Title XXXV, "Descent and Distribution."

VIII.

Constitutional and Statutory Law.

1. Cooley's Elements of Constitutional Law.
2. Cooley's Constitutional Limitations.
3. Bishop on the Written Laws.
4. Constitution of the United States.
5. Constitution of Texas.
6. Revised Statutes, Title LXIV, "Laws"—and Final Title—"General Provisions."

IX.

Criminal Law.

1. 4th Vol. of Blackstone; or Bishop.
2. Penal Code of Texas.
3. Code of Criminal Procedure.

It is recommended that in connection with the topics in the Revised Civil Statutes, specified above, the student read Batts' or Sayles' Notes; also White's or Willson's Notes upon the Penal Code and the Code of Criminal Procedure.

In prescribing the course of study, it is not intended to require the applicant to read any particular book. Any equivalent will be

sufficient. Nor is it intended to require a very close study of the statutes. A general acquaintance with the provisions upon the topics indicated will be sufficient.

Each of the divisions in the foregoing course of study, numbered from I to IX, inclusive, shall be deemed a branch within the meaning of Section 5 of the Act before mentioned.

Since some general education is necessary to a practice of law, it shall be the duty of the Board of Examiners to reject any applicant who, in their opinion, may show himself so deficient in that respect as not to be capable of performing the duties of an attorney.

It is further ordered that in addition to the certificate of the Commissioners Court, as to the moral character and honorable deportment of the applicant, the Board of Examiners shall require him to present also a certificate, of the like effect, from two reputable practicing attorneys, who have known him for the preceding six months.

In case the Board for any reason shall not be satisfied as to the moral character of the applicant, by the proof required by the statute and the rule, they may resort to such other evidence or source of information as they may deem proper.

Given under our hands at Austin, Texas, this the 15th day of July, 1903.

R. R. GAINES,
Chief Justice.
T. J. BROWN,
F. A. WILLIAMS,
Associate Justices of the Supreme Court of Texas.

A true copy.
Attest:
F. T. CONNERLY, Clerk.

BOARDS OF EXAMINERS.

The following Boards of Examiners have been appointed by the Courts of Civil Appeals, for their respective Supreme Judicial Districts, under the Act of March 19, 1903, regulating admission to the bar:

First District.

Lewis R. Bryan.....Houston.
G. G. Kelley.....Wharton.
A. D. Lipscomb.....Beaumont.

Second District.

B. D. Tarlton (successor not yet named).....Fort Worth.
G. H. Goodson.....Comanche.
R. F. Spencer.....Decatur.

Third District.

B. H. Rice.....Marlin.
C. H. Jenkins.....Brownwood.
Will G. Barber.....San Marcos.

Fourth District.

Wm. Aubrey .....San Antonio.
E. A. Atlee.....Laredo.
Wyndham Kemp.....El Paso.

Fifth District.

John L. Henry.....Dallas.
A. P. Park.....Paris.
C. S. Bradley.....Groesbeck.

OFFICERS AND COMMITTEES.

H. C. CARTER.....President.....San Antonio.
H. M. GARWOOD.....Vice-President.....Houston.
A. E. WILKINSON.....Secretary.....Austin.
WILLIAM D. WILLIAMS.....Treasurer.....Fort Worth.

BOARD OF DIRECTORS.

A. L. Beaty .....Sherman.
E. F. Harris .....Galveston.
W. H. Burgess .....El Paso.
R. E. L. Saner.....Dallas.
Edgar Watkins .....Houston.

Committee on Jurisprudence and Law Reform.

James A. Baker.....Houston.
R. L. Brown .....Austin.
Ocie Speer .....Bowie.
Rhodes S. Baker .....Dallas.
M. M. Brooks .....Greenville.

Committee on Judicial Administration and Remedial Procedure.

M. A. Spoonts .....Fort Worth.
Lewis R. Bryan .....Houston.
John T. Duncan .....La Grange.
Edgar Watkins .....Houston.
Hayden W. Head .....Sherman.

Committee on Legal Education and Admission to the Bar.

W. S. Simkins .....Austin.
Clarence H. Miller .....Austin.
Howard Templeton .....Sulphur Springs.
H. C. Connor .....Sulphur Springs.
J. C. Muse .....Dallas.

Committee on Commercial Law.

J. O. Terrell ..... San Antonio.
W. M. Crook ..... Beaumont.
J. W. Thompson ..... Dallas.
Louis B. Eppstein ..... Denison.
J. T. Jones ..... Greenville.

Committee on Grievances and Discipline.

James E. Hill ..... Livingston.
J. M. Pearson ..... McKinney.
J. H. Dinsmore ..... Sulphur Springs.
W. J. Moroney ..... Dallas.
Cecil H. Smith ..... Sherman.

Committee on Criminal Law.

L. W. Moore ..... La Grange.
W. H. Allen ..... Terrell.
J. H. Wood ..... Sherman.
W. L. Crawford ..... Dallas.
J. C. Crisp ..... Beeville.

Committee on Deceased Members.

N. G. Kittrell ..... Houston.
A. E. Wilkinson ..... Austin.
John C. Walker ..... Galveston.

Committee on Publication.

A. E. Wilkinson ..... Austin.
T. S. Reese ..... Austin.
W. M. Key ..... Austin.
Jno. C. Townes ..... Austin.
R. H. Connerly ..... Austin.

Committee on Transportation.

E. B. Parker ..... Houston.
M. A. Spoonts ..... Fort Worth.
F. C. Dillard ..... Sherman.

SPECIAL COMMITTEES.

On Amendment of Law Requiring Unanimity in Jury Trials.

T. S. Reese ..... Austin.
Presley K. Ewing ..... Houston.
S. J. Brooks ..... San Antonio.
L. W. Moore ..... La Grange
B. D. Tarlton ..... Fort Worth.

On Organization of County Bar Asociations.

M. W. Davis..... San Antonio.
Amos L. Beaty ..... Sherman.
L. R. Bryan ..... Houston.
W. C. Wear ..... Hillsboro.
W. H. Allen ..... Terrell.

ROLL OF MEMBERS.

NAME.	RESIDENCE.	ENROLLED.
Abbott, Jo	Hillsboro	July 17, 1882
Adams, J	Kaufman	July 3, 1902
Alexander, W. M	Dallas	July 29, 1896
Allen, W. H	Terrell	Dec. 14, 1883
Allen, W. P	Austin	July 9, 1903
Anderson, Wm. W	Houston	July 29, 1897
Andrews, Frank	Houston	July 25, 1900
Andrews, Jesse	Houston	July 13, 1904
Armstrong, W. T	Galveston	July 25, 1900
Ashe, Chas. E	Houston	July 13, 1904
Atlee, E. A	Laredo	July 24, 1896
Aubrey, Wm	San Antonio	Dec. 25, 1884
Autry, James L	Corsicana	July 29, 1891
Avery, J. M	Dallas	July 29, 1891
Baker, Jas. A., Jr	Houston	July 17, 1882
Baker, Rhodes S	Dallas	July 2, 1902
Bailey, Ed. H	Houston	July 13, 1904
Baldwin, J. C	Houston	July 28, 1898
Ball, Robt. L	San Antonio	Dec. 25, 1884
Ball, T. H	Houston	Dec. 25, 1894
Barbee, Will L	Houston	July 13, 1904
Barrett, L. C	Henrietta	July 26, 1899
Bartlett, F. W	Dallas	July 2, 1902
Bass, C. L	San Antonio	July 8, 1903
Bates, C. L	San Antonio	July 8, 1903
Bates, Wharton	Houston	July 8, 1903
Beall, T. J	El Paso	July 24, 1896
Bean, B. F	Groveton	July 26, 1899
Beaty, A. L	Sherman	July 2, 1902
Beaty, Jno. T	Jasper	July 13, 1904
Belden, Samuel, Jr	San Antonio	July 8, 1903
Bell, A. J	Karnes City	July 20, 1897
Berry, W. C	San Antonio	July 8, 1903
Blake, S. R	Bellville	Dec. 14, 1883
Bookhout, Jno	Dallas	July 2, 1902
Brooks, M. M	Greenville	July 13, 1904
Boone, Gordon	Navasota	July 13, 1904
Borden, Henry L	Houston	July 13, 1904
Botts, Thos. H	Houston	July 13, 1904
Bradley, C. S	Groesbeck	July 8, 1903
Branch, E. C	Nacogdoches	July 31, 1895
Brooks, S. J	San Antonio	July 31, 1895
Brotherson, P. C. H	Galveston	July 29, 1891
Browder, Ed. M	Dallas	July 2, 1902
Brown, T. J	Sherman	July 17, 1882
Brown, R. L	Austin	May 5, 1885
Bryan, Beauregard	Brenham	July 29, 1896
Bryan, Lewis R	Houston	July 29, 1891
Bryan, Chester H	Houston	July 13, 1904
Burges, A. R	San Angelo	July 29, 1896
Burges, R. F	El Paso	July 29, 1896
Burgess, George F	Gonzales	July 28, 1898
Burgess, Wm. H	El Paso	July 8, 1903
Burney, R. H	Kerrville	July 8, 1903
Burns, W. T	Houston	July 30, 1896
Cage, Elliott	Houston	July 13, 1904

ROLL OF MEMBERS—CONTINUED.

NAME.	RESIDENCE.	ENROLLED.
Cantey, S. B.	Fort Worth	July 27, 1898
Campbell, T. M.	Palestine	July 2, 1902
Campbell, J. W.	Houston	July 13, 1904
Carswell, R. E.	Decatur	July 25, 1894
Carter, A. M.	Fort Worth	July 17, 1882
Carter, C. L.	Houston	July 8, 1903
Carter, H. C.	San Antonio	July 25, 1894
Chesley, A.	Bellville	Dec. 14, 1883
Childs, J. D.	San Antonio	July 27, 1898
Clark, George	Waco	July 17, 1882
Clark, Jno. H.	San Antonio	July 29, 1896
Clark, V. N.	Sulphur Springs	July 2, 1902
Clark, Wm. H.	Dallas	July 24, 1886
Cobb, Chas. C.	Dallas	July 29, 1896
Cochran, T. B.	Austin	July 25, 1894
Cockrell, Jos. E.	Dallas	July 29, 1896
Coke, Henry C.	Dallas	July 24, 1886
Coll, George E.	Galveston	July 31, 1901
Coldwell, W. M.	El Paso	July 13, 1904
Connally, Tom	Marlin	July 2, 1902
Connor, H. C.	Sulphur Springs	July 2, 1902
Connerly, R. H.	Austin	July 28, 1898
Cox, W. E.	San Antonio	July 8, 1903
Crane, M. M.	Dallas	July 2, 1902
Crawford, M. L.	Dallas	July 24, 1886
Crawford, M. L., Jr.	Dallas	July 3, 1902
Crawford, W. L.	Dallas	July 17, 1882
Crawford, Walter J.	Beaumont	July 2, 1902
Crisp, J. C.	Beeville	July 27, 1893
Crook, W. M.	Beaumont	July 8, 1903
Culberson, Chas. A.	Dallas	July 17, 1882
Cunningham, A. M.	San Antonio	July 8, 1903
Dannenbaum, H. J.	Houston	July 13, 1904
Davidson, R. V.	Galveston	July 17, 1882
Davis, L. B.	Cleburne	July 24, 1886
Davis, M. W.	San Antonio	July 8, 1903
Denman, L. G.	San Antonio	July 25, 1894
Dillard, F. C.	Sherman	July 31, 1895
Dinsmore, J. H.	Sulphur Springs	July 2, 1902
Dodd, Thomas W.	Laredo	July 24, 1886
Droulhet, P. A.	Galveston	July 31, 1901
Duff, F. J.	Beaumont	July 31, 1896
Duff, R. C.	Beaumont	July 31, 1901
Duncan, Jno. M.	Tyler	July 29, 1896
Duncan, J. T.	La Grange	July 29, 1897
Dyer, Jno. L., Jr.	El Paso	July 27, 1898
Eagle, Joe H.	Houston	July 8, 1903
Eberhart, F. S.	Gilmer	July 2, 1902
Edwards, Peyton F.	El Paso	July 29, 1896
Eppstein, Louis B.	Denison	July 9, 1903
Evans, H. G.	Bonham	July 29, 1896
Ewing, Presley K.	Houston	July 11, 1899
Feagin, J. O.	Livingston	July 13, 1904
Finley, N. W.	Dallas	July 17, 1882
Fisher, Lewis	Galveston	July 8, 1903
Fisher, Sam R.	Austin	July 17, 1882
Flood, W. W.	Fort Worth	July 4, 1888
Flowers, M. O.	San Antonio	July 9, 1903
Ford, T. W.	Houston	July 17, 1882
Ford, T. O.	Houston	July 28, 1898
Foster, Arthur C.	Haskell	July 26, 1893
Franklin, Thos. H.	San Antonio	Dec. 25, 1884
Gaines, R. R.	Austin	July 26, 1894
Garrett, C. C.	Brenham	July 17, 1882
Garrett, W. B.	San Antonio	July 13, 1904
Garwood, H. M.	Houston	July 25, 1894
Gilbert, J. E.	San Antonio	July 8, 1903

ROLL OF MEMBERS—CONTINUED.

NAME.	RESIDENCE.	ENROLLED.
Gill, W. H.	Palestine	July 26, 1899
Glass, Hiram	Texarkana	July 28, 1894
Gossett, M. H.	Kaufman	July 3, 1902
Gray, C. J.	Hallettsville	July 8, 1903
Green, P. H.	Hallettsville	July 8, 1903
Greenwood, C. F.	Hillsboro	July 3, 1902
Greer, R. A.	Beaumont	July 27, 1898
Gresham, Walter	Galveston	July 17, 1882
Gresham, Walter, Jr.	Galveston	July 27, 1898
Grimes, S. F.	Quero	July 17, 1882
Guinn, J. D.	San Antonio	July 27, 1898
Griner, J. G.	Del Rio	July 13, 1904
Goeth, C. A.	San Antonio	July 8, 1903
Halbert, J. L.	Corsicana	July 31, 1895
Hall, R. W.	Vernon	July 26, 1899
Hamblen, E. P.	Houston	July 13, 1904
Hamblen, Otis K.	Houston	July 13, 1904
Haralson, E. M.	Houston	July 13, 1904
Harris, Ed. F.	Galveston	July 24, 1892
Harris, Jno. Chas.	Houston	July 29, 1891
Harris, R. C.	Beaumont	July 13, 1904
Harris, Theodore	San Antonio	July 27, 1898
Harrison, Robt.	Fort Worth	July 25, 1900
Harwood, T. F.	Gonzales	Dec. 12, 1882
Hawkins, E. A., Jr.	Galveston	July 30, 1897
Head, Hayden W.	Sherman	July 13, 1904
Hefley, W. T.	Cameron	July 17, 1882
Heilborn, A. E.	San Antonio	July 9, 1903
Henderson, Jno. N.	Bryan	July 10, 1889
Henry, Jno. L.	Dallas	July 24, 1886
Hicks, Marshall	San Antonio	July 8, 1903
Hicks, Yale	San Antonio	July 24, 1898
Hildebrand, Ira P.	San Antonio	July 8, 1903
Hill, James E.	Livingston	Aug. 6, 1890
Hill, James E., Jr.	Livingston	July 25, 1894
Hill, Sam'l F.	Livingston	July 9, 1903
Holland, W. M.	Dallas	*July 2, 1902
Holloway, Thos. T.	Dallas	July 2, 1902
Houston, A. W.	San Antonio	July 17, 1882
Houston, Reagan	San Antonio	July 17, 1882
Huff, S. P.	Vernon	July 28, 1897
Hughes, W. E.	Dallas	July 31, 1896
Hume, F. Chas.	Houston	July 17, 1882
Hume, F. Chas., Jr.	Houston	July 26, 1899
Hunt, W. S.	Houston	July 28, 1898
Hunter, Sam J.	Fort Worth	July 4, 1888
Ingrum, R. P.	San Antonio	July 8, 1903
James, Jno. H.	San Antonio	July 25, 1894
Jester, C. L.	Corsicana	July 29, 1897
Johnson, Marsene	Galveston	July 31, 1895
Jones, F. O.	Houston	July 28, 1898
Jones, J. T.	Greenville	July 2, 1902
Jones, Nat B.	San Antonio	July 8, 1903
Jones, Wm. M.	Dallas	July 2, 1902
Jordan, H. P.	Waco	July 25, 1900
Kassel, Chas.	Sherman	July 8, 1903
Keller, C. A.	San Antonio	July 8, 1903
Kelley, G. G.	Wharton	July 29, 1896
Kelso, Winchester	Eagle Pass	July 29, 1896
Kemp, Wyndham	El Paso	July 26, 1899
Key, W. M.	Austin	July 25, 1894
Kittrell, N. G.	Houston	Dec. 25, 1884
Kittrell, N. G., Jr.	Houston	July 13, 1904
Kleberg, M. E.	Galveston	July 17, 1882
Kleiber, Jno. I.	Brownsville	July 8, 1903
Knight, R. E. L.	Dallas	July 25, 1894
Kopperl, M. O.	Galveston	July 25, 1900
Kopperl, M. A.	Austin	July 2, 1902

ROLL OF MEMBERS—CONTINUED.

NAME.	RESIDENCE.	ENROLLED.
Krueger, C. G.	Bellville	July 13, 1904
Lancaster, J. E.	Waxahachie	July 31, 1895
Lane, Jonathan.	Houston	July 17, 1882
Lanier, J. F.	Beaumont	July 26, 1899
Lee, Chas. K.	Fort Worth	July 25, 1894
Lenert, Geo. E.	La Grange	July 13, 1904
Leeper, Wadsworth D.	Houston	July 13, 1904
Leonard, H. B.	San Antonio	July 8, 1903
Lewis, Perry J.	San Antonio	July 31, 1895
Lewis, Yancey	Austin	July 2, 1903
Lindsley, Phillip	Dallas	July 31, 1895
Lipscomb, A. D.	Beaumont	July 28, 1897
Lively, Hiram F.	Dallas	July 2, 1902
Locke, Maurice E.	Dallas	July 2, 1902
Lockett, J. W.	Houston	July 13, 1904
Lockhart, Wm. B.	Galveston	July 30, 1896
Louis, B. F.	Houston	July 13, 1904
Love, Thos. B.	Dallas	July 2, 1902
Lovett, R. S.	New York	July 11, 1889
Lovejoy, Jno.	Houston	July 17, 1882
McBride, L. C.	Cameron	July 2, 1902
McCampbell, Jno. S.	Corpus Christi	July 17, 1882
McCormick, A. P.	Dallas	July 29, 1891
McDonald, D. D	Galveston	July 31, 1901
McEachin, J. S.	Richmond	July 28, 1897
McKie, W. J.	Corsicana	July 29, 1891
McLean, W. P.	Fort Worth	July 24, 1886
McLauren, Lauch.	Dallas	July 25, 1900
McMahon, J. B.	Temple	July 28, 1897
McNeal, Thomas.	Lockhart	May 5, 1885
McRae, Chas. C.	Houston	July 2, 1902
Malevinsky, M. L.	Houston	July 25, 1894
Mann, George E.	Galveston	July 17, 1882
Martin, Thos. B.	Beaumont	July 17, 1882
Masterson, B. T.	Galveston	July 17, 1882
Masterson, Tom W.	Galveston	July 13, 1904
Masterson, J. Harris.	Galveston	July 13, 1904
Masterson, Harris	Houston	July 13, 1904
Masterson, A. E.	Angleton	July 13, 1904
Maury, Richard G.	Houston	July 8, 1903
Maxey, T. S.	Austin	July 17, 1882
Miller, Clarence H.	Austin	July 27, 1899
Miller, Geo. E.	Fort Worth	July 29, 1897
Miller, T. S.	Dallas	July 24, 1886
Minor, F. D.	Beaumont	July 17, 1882
Montrose, T. D.	Greenville	July 10, 1889
Moore, L. W.	La Grange	July 2, 1902
Moore, W. F.	Cundiff	May 5, 1885
Morgan, Richard.	Dallas	July 17, 1882
Moroney, W. J.	Dallas	July 3, 1902
Morrison, W. A.	Rockdale	July 26, 1899
Morrow, W. C.	Hillsboro	July 26, 1899
Mosely, A. G.	Denison	July 11, 1889
Mott, M. F.	Galveston	July 17, 1882
Murphy, Thos. O.	San Antonio	July 8, 1903
Muse, J. C.	Dallas	July 2, 1902
Neal, George D.	Navasota	July 26, 1893
Neblett, R. S.	Corsicana	*July 3, 1902
Neethe, Jno.	Galveston	July 8, 1903
Neill, Robt. T.	San Antonio	July 8, 1903
Nelms, Hayne.	Groveton	July 26, 1899
Newman, F. M.	Brady	July 31, 1901
Nichols, Jos. F.	Greenville	July 31, 1895
Niday, Jas. E.	Houston	July 13, 1904
Norton, J. R.	San Antonio	July 27, 1898
Nunn, D. A., Jr.	Crockett	July 25, 1894
O'Brien, Geo. W.	Beaumont	Dec. 14, 1883

ROLL OF MEMBERS—CONTINUED.

NAME.	RESIDENCE.	ENROLLED.
Ogden, Chas. W.	San Antonio	July 8, 1903
Onion, J. F.	San Antonio	July 27, 1898
Padelford, S. C.	Cleburne	July 24, 1896
Parker, Edwin B.	Houston	July 27, 1898
Parker, Jno. W.	Houston	July 30, 1896
Parks, W. N.	Brownsville	July 8, 1903
Parr, J. K.	Hillsboro	July 25, 1899
Patteson, James.	Cooper	July 2, 1902
Pearson, D. R.	Richmond	July 8, 1903
Pearson, J. M.	McKinney	July 8, 1903
Peeler, Jno. L.	Austin	July 27, 1898
Pendarvis, G. H.	Houston	July 13, 1904
Perkins, E. B.	Dallas	July 24, 1896
Perryman, Sam R.	Houston	July 11, 1899
Phelps, Ed. S.	Houston	July 13, 1904
Phillips, Nelson.	Hillsboro	July 2, 1902
Pierson, Wm.	Greenville	July 13, 1904
Pleasants, R. A.	Cuero	July 25, 1900
Plowman, Geo. H.	Dallas	July 24, 1896
Potter, C. C.	Gainesville	July 2, 1902
Powell, Geo.	San Antonio	July 8, 1903
Powell, D. J.	San Antonio	July 8, 1903
Prather, W. L.	Austin	July 17, 1882
Proctor, F. C.	Victoria	July 29, 1891
Proctor, D. C.	Cuero	July 17, 1882
Rainey, Anson.	Waxahachie	July 17, 1882
Reese, T. S.	Hempstead	Dec. 14, 1883
Rice, B. H.	Marlin	July 27, 1898
Robertson, Jas. M.	Meridian	July 29, 1896
Robinson, C. W.	Houston	July 13, 1904
Robson, W. S.	La Grange	July 17, 1882
Routledge, Jas.	San Antonio	July 29, 1896
Rowe, T. C.	Houston	July 13, 1904
Ruby, Jno. H.	Houston	July 25, 1900
Russell, Spencer C.	Richmond	July 2, 1902
Ryan, Joseph.	San Antonio	July 9, 1903
Salliway, H. B.	San Antonio	July 8, 1903
Saner, R. E. L.	Dallas	July 25, 1900
Sanford, A. D.	Waco	July 25, 1900
Sayers, J. D.	San Antonio	July 17, 1882
Schwartz, Samuel.	San Antonio	July 8, 1903
Scott, Walter H.	Houston	July 13, 1904
Searcy, W. W.	Brenham	July 17, 1882
Sears, W. G.	Houston	July 9, 1903
Seeligson, A. W.	San Antonio	July 8, 1903
Sehorn, Jno.	San Antonio	July 27, 1898
Shearon, Thos.	Dallas	July 13, 1904
Shaw, W. N.	Houston	Dec. 14, 1883
Shepard, Seth.	Dallas (Washington)	July 17, 1882
Shepherd, Jas. L.	Colorado	July 26, 1899
Simkins, W. S.	Austin	July 17, 1882
Simmons, D. E.	Sherman	July 25, 1900
Smith, Tillman.	Fort Worth	July 30, 1896
Smith W. J. J.	Dallas	July 2, 1902
Sonfield, Leon.	Beaumont	July 25, 1900
Speer, Ocie.	Bowie	July 13, 1904
Spence, Joseph, Jr.	San Angelo	July 31, 1896
Spencer, F. M.	Galveston	July 17, 1882
Spoonts, M. A.	Fort Worth	July 25, 1894
Standifer, I. M.	Houston	July 31, 1896
Stewart, Jno. S.	Houston	July 29, 1896
Stone, T. H.	Houston	July 28, 1898
Storey, L. J.	Austin	May 5, 1885
Street, Robt. G.	Galveston	July 17, 1882
Streetman, Sam.	Houston	July 28, 1897
Stubbs, Chas. J.	Galveston	July 25, 1900
Stubbs, Jas. B.	Galveston	July 17, 1882

ROLL OF MEMBERS—CONTINUED.

NAME.	RESIDENCE.	ENROLLED.
Sullivan, J. C.	San Antonio	July 8, 1903
Swearingen, P. H.	San Antonio	July 8, 1903
Tallaferro, Sinclair	Houston	July 17, 1882
Tarlton, B. D.	Fort Worth	July 17, 1882
Templeton, Howard	Sulphur Springs	July 2, 1903
Terrell, J. O.	San Antonio	July 17, 1882
Terry, J. W.	Galveston	July 17, 1882
Thompson, J. W.	Dallas	July 2, 1902
Tod, John G.	Houston	July 11, 1889
Tompkins, Arthur C.	Hempstead.	July 10, 1889
Townes, Jno. C.	Austin	July 29, 1896
Tucker, Chas. F.	Dallas	*July 2, 1902
Turney, W. W.	El Paso	July 27, 1898
Walker, Jno. C.	Galveston	July 17, 1882
Ward, R. H.	San Antonio	July 8, 1903
Wash, F. H.	San Antonio	July 29, 1896
Watkins, A. B	Athens	July 2, 1902
Watkins, Edgar	Houston	July 31, 1895
Wear, W. C.	Hillsboro	July 11, 1889
Webb, B. R.	Fort Worth	July 25, 1894
Welch, Stanley	Corpus Christi	July 25, 1900
White, Jno. P.	Austin	July 25, 1894
Wilkerson, J. D.	Beaumont	July 13, 1904
Wilkinson, A. E.	Austin	July 25, 1894
Williams, Eugene	Waco	July 17, 1882
Williams, F. A.	Austin	July 25, 1894
Williams, Mason	San Antonio	July 8, 1904
Williams, Wm. D.	Fort Worth	May 5, 1885
Wilson, J. I.	Houston	July 2, 1902
Wilson, Wm. H.	Houston	July 28, 1897
Winter, J. G.	Waco	July 24, 1884
Wood, J. H.	Sherman	July 27, 1898
Wozencraft, A. P	Dallas	July 29, 1896
Wren, Clark C.	Houston	July 13, 1904
Young, Jno. L.	Dallas	July 28, 1894

* Readmitted.

DECEASED MEMBERS.

ADAMS, Z. T., Kaufman. Died January 9, 1886.
ANDERSON, JAS. M., Waco. Died June 3, 1889.
ANDREWS, A. W., Terrell. Died February 15, 1887.
ARCHER, OSCEOLA, Austin. Died April, 1898.
AUSTIN, WM. J., Denton. Died September 7, 1888.

BAKER, JAMES A., Sr., Houston. Died February 23, 1897.
BALL, F. W., Fort Worth. Died September 9, 1900.
BALLINGER, T. J., Galveston. Died October 27, 1899.
BALLINGER, W. P., Galveston. Died January 28, 1888.
BASSETT, B. H., Dallas. Died July 15, 1893.
BLEDSOE, D. T., Cleburne. Died July 1, 1893.
BONNER, M. H., Tyler. Died November 25, 1883.
BOTTS, W. B., Houston. Died March 7, 1894.
BRADLEY, L. D., Fairfield. Died October 6, 1886.
BRADSHAW, C. J., La Grange. Died June 13, 1888.
BRYANT, J. D., Richmond. Died August, 16, 1904.
BURGES, W. H., Seguin. Died 1897.
BURTS, J. H., Austin. Died January 15, 1894.

CARRINGTON, W. A., Houston. Died July 14, 1892.
CLEVELAND, C. L., Galveston. Died February, 1892.
COOPER, M. S., Conroe. Died May, 1899.
CRAIN, W. H., Cuero. Died February 10, 1896.
CROOM, J. L., Jr., Wharton. Died August 2, 1890.

DAVIS, GEORGE W., Dallas. Died September, 1898.
DEVINE, THOS. J., San Antonio. Died March 16, 1890.

FORD, P. S., Cameron. Died December 11, 1893.
FRISBIE, W. H., Groesbeck. Died September 12, 1883.

GARRETT, N. P., Cameron. Died August 3, 1888.
GILES, W. M., Mineola. Died 1901.
GIVENS, J. S., Corpus Christi. Died January 20, 1887.
GOLDTHWAITHE, GEORGE, Houston. Died April 23, 1897.
GOSLING, H. L., Castroville. Died February 21, 1885.
GOULD, ROBERT S., Austin. Died 1904.
GRANBERRY, M. C., Austin. Died ————.
GREEN, JOHN A., Sr., San Antonio. Died July 8, 1899.
GREENE, S. P., Fort Worth. Died 1904.
GUINN, R. H., Rusk. Died January 18, 1888.

HAGGERTY, J. J., Bellville. Died April 7, 1893.
HANCOCK, JOHN, Austin. Died July 19, 1893.
HARRIS, JAMES L., Dallas. Died ————.
HARWOOD, THOMAS M., Gonzales. Died January 29, 1900.
HERRING, M. D., Waco. Died November 27, 1897.

HILL, GEORGE L., Gainesville. Died July 25, 1887.
HILL, R. J., Austin. Died March 30, 1899.
HOLMES, H. M., Mason. Died August 17, 1895.
HURT, J. M., Dallas. Died ————.
HUTCHINGS, R. M., Galveston. Died August 22, 1895.

JACKSON, A. M., Sr., Austin. Died July 11, 1889.
JACKSON, A. M., Jr., Austin. Died August 17, 1894.
JOHN, A. S., Beaumont. Died February 5, 1889.
JOHNSON, BYRON, Galveston. Died March 2, 1900.
JONES, C. ANSON, Houston. Died January 10, 1888.

KENNARD, JNO. R., Anderson. Died October 24, 1884.
KILGORE, S. B., Wills Point. Died December 10, 1891.
KIRK, LAFAYETTE, Brenham. Died July 29, 1893.

LABATT, HENRY J., Galveston. Died September 8, 1900.
LANGUILLE, P. T., Galveston. Died October 14, 1882.
LEDBETTER, W. H., La Grange. Died April 24, 1896.
LEVI, LEO N., New York. Died ————.
LIGHTFOOT, HENRY W., Paris. Died August, 1901.
LOGUE, L. J., Columbus. Died May 15, 1884.
LOOSCAN, M., Houston. Died September 7, 1897.

MANN, H. K., Galveston. Died December 14, 1888.
MASON, GEORGE, Galveston. Died February 3, 1896.
MASON, J. R., San Antonio. Died July 29, 1888.
MASTERSON, B. T., Jr., Galveston. Died 1897.
MAXEY, S. B., Paris. Died August 16, 1895.
McCLELLAN, E. D., Bonham. Died November 28, 1899.
McCOY, JNO. C., Dallas. Died April 30, 1887.
McLEMORE, M. C., Galveston. Died July 23, 1897.
MOORE, GEO. F., Austin. Died August 30, 1883.
MOORE, JNO. M., Edna. Died ————.
MORSE, CHARLES S., Austin. Died May 13, 1902.

NOBLE, S. B., Galveston. Died March 20, 1890.

OCHSE, J. F., San Antonio. Died September 24, 1888.

PASCHALL, GEORGE, San Antonio. Died September 7, 894.
PEARSON, P. E., Richmond. Died July 31, 1895.
PECK, L. D., Fairfield. Died May 30, 1885.
PEELER, A. J., Austin. Died November 3, 1886.
PHELPS, R. H., La Grange. Died March 24, 1898.
PONTON, T. J., Gonzales. Died December 9, 1889.
PRENDERGAST, H. D., Austin. Died November 5, 1886.

QUINAN, GEORGE, Wharton. Died January 25, 1893.

READ, N. C., Corsicana. Died October 25, 1884.
ROBERTS, O. M., Austin. Died May 19, 1898.
ROBERTSON, JOHN W., Austin. Died June 30, 1892.
ROBERTSON, SAWNIE, Dallas. Died June 21, 1892.
RUCKER, W. T., Belton. Died August 10, 1885.

SAYLES, JOHN, Abilene. Died 1897.
SCOTT, J. Z. H., Galveston. Died January 18, 1904.
SEMPLE, J. M., Sherman. Died ————.
SEXTON, FRANK B., El Paso-Marshall. Died May 15, 1900.

SHELLEY, N. G., Austin. Died January 5, 1898.
SHROPSHIRE, E. L., Comanche. Died July 4, 1894.
SIMKINS, E. J., Corsicana. Died ————.
SIMPSON, ISAAC P., San Antonio. Died 1896.
SMITH, THOMAS S., Hillsboro. Died March 15, 1901.
STAYTON, JOHN W., Victoria. Died July 5, 1894.
STEWART, CLEGG, Galveston. Died January 15, 1902.
STEWART, JOE H., Austin. Died August 14, 1890.
SWEARINGEN, J. T., Brenham. Died August 14, 1890.

TEICHMUELLER, H., La Grange. Died February 17, 1901.
TEMPLETON, JOHN D., Fort Worth. Died April 24, 1893.
TIMMONS, B., La Grange. Died June 17, 1884.
TUCKER, PHILIP C., Galveston. Died July 9, 1894.

WAELDER, JACOB, San Antonio. Died August 28, 1887.
WALKER, A. S., Sr., Austin. Died August 14, 1896.
WALKER, RICHARD S., Galveston. Died May 24, 1892.
WALLACE, W. R., Castroville. Died November 12, 1884.
WALTHALL, L. N., San Antonio. Died February 22, 1894.
WARD, P. H., San Antonio. Died January 28, 1899.
WAUL, THOMAS N., Neyland. Died ————.
WEST, CHARLES S., Austin. Died October 23, 1895.
WEST, ROBERT G., Austin. Died ————.
WHEELER, ROYALL T. Died 1900.
WILKES, F. D., Lampasas. Died November 21, 1886.
WILLIE, ASA H., Galveston. Died March 16, 1899.
WILSON, SAM A., Rusk. Died January 24, 1891.

[NOTE.—The Secretary requests all members to notify him promptly of the death of any member of the Association.]

NEW MEMBERS.

The following lawyers were admitted to membership in the Texas Bar Association at its meeting at Houston on July 13 and 14, A. D. 1904:

Andrews, Jesse.....Houston
Ashe, Charles E.....Houston
Bailey, Edward H.....Houston
Barbee, Will L.....Houston
Beaty, John T.....Jasper
Boone, Gordon.....Navasota
Borden, Henry L.....Houston
Botts, Thomas H.....Houston
Brooks, M. M.....Greenville
Bryan, Chester H.....Houston
Cage, Elliott.....Houston
Campbell, J. W.....Houston
Coldwell, W. M.....El Paso
Dannenbaum, Henry J.....Houston
Feagin, J. C.....Livingston
Garrett, W. B.....San Antonio
Griner, J. G.....Del Rio
Hamblen, Otis K.....Houston
Hamblen, E. P.....Houston
Haralson, E. M.....Houston
Harris, R. C.....Beaumont
Head, Hayden W.....Sherman
Kittrell, Norman G., Jr.....Houston
Krueger, C. G.....Bellville
Leeper, Wadsworth D.....Houston
Lenert, George E.....La Grange
Lockett, J. W.....Houston
Louis, B. F.....Houston
Masterson, A. E.....Angleton
Masterson, Harris.....Houston
Masterson, J. Harris.....Galveston
Masterson, Thomas W.....Galveston
Niday, James E.....Houston
Pendarvis, G. H.....Houston
Phelps, Ed. S.....Houston
Pierson, William.....Greenville
Rowe, T. C.....Houston
Robinson, C. W.....Houston
Scott, Walter H.....Houston
Shearon, Thomas.....Dallas
Speer, Ocie.....Bowie
Wilkerson, J. D.....Beaumont
Wren, Clark C.....Houston

TEXAS BAR ASSOCIATION.

CONSTITUTION.

ARTICLE I.

NAME AND OBJECTS OF THE ASSOCIATION.

SECTION 1. This Association shall be called the TEXAS BAR ASSOCIATION.

SEC. 2. Its objects shall be to advance the science of jurisprudence, promote the uniformity of legislation and the administration of justice throughout the State, uphold the honor of the profession of the law, and encourage cordial intercourse among its members.

ARTICLE II.

MEMBERSHIP.

SECTION 1. Any attorney of the Texas bar, in honorable standing, upon his written application, may be admitted to membership at any regular meeting of the Association. Said application must be endorsed by three members of the Association, and a fee of $5 shall accompany the same—$2.50 initiation fee and $2.50 annual dues.

SEC. 2. Such application shall be referred to the Board of Directors, who shall report the same to the Association, and, if said report be favorable, a ballot shall be taken, and, if four-fifths of the members voting shall be in favor of the applicant, he shall be declared elected.

ARTICLE III.

OFFICERS AND THEIR DUTIES.

SECTION 1. The officers of the Association shall be a President, a Vice-President, a Secretary, and a Treasurer, who shall be chosen by ballot at a regular meeting by a majority of the members present and voting.

SEC. 2. There shall be a Board of Directors, five in number, elected at the same time and in the same manner with the officers, and the President and Vice-President shall be *ex-officio* members of the Board.

SEC. 3. The officers and Directors shall hold their places for one year and until their successors shall be elected; provided, that the same person shall not be elected President two years in succession.

SEC. 4. The duties of officers shall be such as usually devolve upon such positions, and may be regulated and prescribed from time to time by the Constitution, By-Laws or resolutions of the Association.

SEC. 5. The Board of Directors shall have exclusive authority, and shall exercise executive supervision over the affairs of the Association between its meetings.

SEC. 6. Vacancies in the offices and Board of Directors shall be filled by the Board, the concurrence of a majority of whom shall be necessary to a choice.

ARTICLE IV.

COMMITTEES.

SECTION 1. The following committees shall be appointed annually by the President for the year ensuing, and shall consist of five members each: On Jurisprudence and Law Reform; on Judicial Administration and Remedial Procedure; on Legal Education and Admission to the Bar; on Criminal Law and Criminal Procedure; on Commercial Law; on Publication; on Grievances and Discipline.

SEC. 2. A committee of three, of whom the Secretary shall always be one, shall be appointed by the President at each annual meeting of the Association, whose duty it shall be to report to the next meeting the names of all members who shall in the interval have died, with such notices of them as shall, in the discretion of the committee, be proper.

ARTICLE V.

GENERAL POWERS.

SECTION 1. This Association shall have the power to impose fines, assess fees, and establish by-laws for its government. It shall have power to remove officers and suspend or expel members for good cause, upon written charges exhibited against them by a member, and due notice given of the charges and of the time they will be brought before the Association.

SEC. 2. The By-Laws shall prescribe the assessment to be levied on the members for the support of the Association and the promotion of its objects.

ARTICLE VI.

QUORUM.

SECTION 1. Twenty-five members in regular standing shall constitute a quorum for the transaction of business.

ARTICLE VII.

ANNUAL ADDRESS.

SECTION 1. The President shall open each meeting of the Association with an address, in which he shall communicate the noteworthy changes in statutory and constitutional law, and especially such changes as affect the development and progress of the law and the administration of justice.

ARTICLE VIII.

MEETINGS.

SECTION 1. A majority of the members present at an annual meeting of this Association shall designate the time and place for holding the next annual meeting.

ARTICLE IX.

AMENDMENTS.

SECTION 1. All propositions to alter, amend, or add to this Constitution shall be made in writing at a meeting of the Association, and filed with the Secretary at least one month before being acted upon, and shall not be adopted without the concurrence of two-thirds of the members present.

ARTICLE X.

DUES.

SECTION 1. Each member of the Association shall pay to the Secretary the sum of $2.50 as annual dues.

BY-LAWS.

ARTICLE I.

PRESIDING OFFICERS.

SECTION 1. The President, and in his absence the Vice-President, shall preside at all meetings of the Association; if neither of these officers be present, a President *pro tem.* shall be chosen by and from the attending members.

ARTICLE II.

ADDRESS AND ESSAYS.

SECTION 1. The Board of Directors, at its first meeting after each annual meeting shall select some person to make an address at the next annual meeting, and not exceeding six persons to read papers.

ARTICLE III.

ANNUAL MEETINGS AND ORDER OF BUSINESS.

SECTION 1. The order of exercises at the annual meeting shall be as follows:

1. Opening address of the President.
2. Nomination and election of members.
3. Report of Board of Directors.
4. Election of Board of Directors.
5. Reports of Secretary and Treasurer.
6. Reports of Standing Committees, as follows: On Jurisprudence and Law Reform; on Judicial Administration and Remedial Procedure; on Legal Education and Admission to the Bar; on Commercial Law; on Publication; on Grievances and Discipline.
7. Reports of special committees.
8. Nomination of officers.
9. Miscellaneous business.
10. The election of officers.
11. The annual address, to be delivered by the person selected by the Board of Directors, shall be made at the morning session of the second day of the annual meeting.

SEC. 2. This order of business may be changed at any meeting by a vote of a majority of the members present; and, except otherwise provided by the Constitution or By-Laws, the usual parliamentary rules and orders will govern the proceedings.

SEC. 3. No person shall speak more than ten minutes at a time, nor more than twice on the same subject.

SEC. 4. A stenographer shall be employed at each annual meeting.

SEC. 5. Each county bar association may annually appoint delegates, not exceeding three in number, to the next meeting of the Association, and such delegates shall be entitled to all the privileges of membership at and during said meeting.

SEC. 6. All papers read before the Association shall be lodged with the Secretary. The annual address of the President, the reports of the committees and proceedings of the annual meeting shall be printed, but no

other address made or paper read or presented shall be printed except by order of the Committee on Publication.

SEC. 7. The Board of Directors shall, as soon as parties have been selected to deliver the annual address and read essays, notify the Secretary of this Association of such selections, and of any other matters of especial interest to be brought before the next annual meeting.

SEC. 8. The Secretary shall be and is hereby required to mail each member of the Association, ten days before each annual meeting, a written or printed notice of the time and place of such meeting, giving a statement of the addresses to be delivered, the papers to be read, and other matters of especial interest, and shall also cause such notice to be published.

ARTICLE IV.

MEMBERSHIP AND DUES.

SECTION 1. The initiation fee to entitle a person to membership shall be $5, which shall include the annual dues for the first year.

SEC. 2. The annual dues shall be payable at the annual meeting, in advance, and should any members neglect to pay them for one year at or before the next annual meeting, he shall cease to be a member. The Secretary shall give notice of this By-Law, within sixty days after each meeting, to all members in default.

ARTICLE V.

OFFICERS AND COMMITTEES.

SECTION 1. The terms of office of all officers elected at the annual meeting shall commence at adjournment thereof, except the Board of Directors, whose term of office shall commence immediately upon their election.

SEC. 2. The President shall appoint all committees, except the Committee on Publication, within thirty days after the annual meeting, and shall announce them to the Secretary, who shall promptly give notice to the person appointed. The Committee on Publication shall be appointed on the first day of each meeting.

SEC. 3. The Secretary's and Treasurer's reports shall be examined and audited by the Board of Directors before their presentation to the Association.

SEC. 4. The Board of Directors and all standing committees shall meet on the day preceeding each annual meeting, at the place where the same is to be held, at such hours as their respective chairman shall appoint, and should any member of any committee be absent, the vacancy may be filled by the members of the committee present.

SEC. 5. The Committee on Publication shall meet within one month after each annual meeting at such time and place as the chairman shall appoint.

SEC. 6. Special meetings of any committee shall be held at such times and places as the chairman thereof may appoint; reasonable notice shall be given by him to each member by mail.

ARTICLE VI.

SECTION 1. It shall be the duty of the Committee on Jurisprudence and Law Reform to consider and report to the Association such amendments to the law as in its opinion should be adopted; also to scrutinize proposed changes in the law, and when necessary, report upon the same.

SEC. 2. It shall be the duty of the Committee on Judicial Administration and Remedial Procedure to observe the practical working of the judicial system of the State, and recommend, by written or printed report, from time to time, any changes therein which observation and experience may suggest.

SEC. 3. It shall be the duty of the Committee on Legal Education and Admission to the Bar to report the most suitable means for promoting and facilitating the study of the law, and the necessity or propriety of elevating the standard of qualifications for admission to the bar, and the best means for accomplishing that object.

SEC. 4. It shall be the duty of the Committee on Commercial Law to report the best means to produce uniformity in commercial law and usages.

SEC. 5. The Committee on Publication shall pass upon and have printed all papers, should they deem them of sufficient importance, except as it is otherwise provided by the Constitution and By-Laws.

SEC. 6. The Committee on Grievances and Discipline shall report as to the best means of upholding the honor and dignity of the law in the professional intercourse among the members of the Association. All complaints against any member of this Association shall be presented to this committee, and if the committee shall be of the opinion that the matters alleged are of sufficient importance, they will determine upon the course of procedure for the trial of the same; and shall give notice to the party charged of the nature of the complaint and the time of the trial thereof by the Association; all of which the complainant shall also be notified by the committee.

ARTICLE VII.

RESOLUTIONS.

SECTION 1. No resolutions complimentary to any officer or member, for any service performed, paper read or address delivered, shall be considered by this Association.

ARTICLE VIII.

AMENDMENTS.

SECTION 1. These By-Laws may be amended at any meeting of the Association by a vote of two-thirds of those present; provided, that a copy of the proposed amendment shall have been filed with the Secretary on or before the first day of such annual meeting.

TEXAS BAR ASSOCIATION.

[REPRINTED, BY PERMISSION, FROM THE YEAR BOOK FOR TEXAS, 1903.]

Bar associations flourish in most of the States of the Union, but comparatively few of them are able to present a record of continuous and successful annual meetings for so many years as does that of Texas. The Association was organized at a meeting held in Galveston on the 15th and 17th days of July, 1882, in pursuance of a call for that purpose signed by all the judges of the appellate courts and by many leading lawyers throughout the State. The list of those issuing the call contains many names over which the memory of Texas lawyers loves to linger with tender reverence. They were O. M. Roberts, Geo. F. Moore, Robert S. Gould, M. H. Bonner, John W. Stayton, John P. White, J. M. Hurt, Sam A. Willson, R. S. Walker, A. T. Watts, W. S. Delaney, A. S. Walker, J. H. McLeary, A. W. Terrell, A. M. Jackson, C. S. West, John B. Rector, W. P. Ballinger, T. N. Waul, A. H. Willie, Robt. G. Street, C. L. Cleveland, Throckmorton, Brown & Bryant, F. Chas. Hume, Philip C. Tucker, Frank B. Sexton, Thos. J. Devine, Jacob Waelder, James F. Miller, Thos. M. Harwood, Simkins & Simkins, Baker & Botts, Hutcheson & Carrington, George T. Todd, Walter Acker, J. A. Carroll, Marshall Fulton, E. G. Bower, Richard Morgan, Jr., A. H. Field, A. W. De Berry, John E. Elgin, Sayles & Bassett, Hare & Head, Woods, Wilkins & Cunningham, Makemson, Fisher & Price.

Hon. Thos. J. Devine was made the first President, with an imposing array of Vice-Presidents, and Chas. S. Morse, Secretary, a position which he was destined to fill continuously for twenty years.

A constitution and by-laws were adopted, and the first meeting of the organized society fixed for December of the same year, in

Galveston. A list of over 300 members appears in the published reports of this organization meeting.

At the regular annual meeting in December the Association promptly showed that it took seriously the object professed in its constitution of advancing the science of jurisprudence and promoting the administration of justice. Its first action on meeting was to elect a presiding officer in the place of its President, who was absent, and to pass on applications for membership. The next was to name W. P. Ballinger, Geo. F. Moore, W. L. Prather, B. H. Bassett and T. J. Brown as a committee to prepare an amended judiciary article for the constitution to be urged on the Legislature at its next session.

It was an era of overburdened courts and delayed justice, and the Association struck promptly at the most crying abuse then existing in the administration of the law.

Gen. T. N. Waul was elected President of the Association, and the next meeting fixed at Houston, in December, 1883. That session found the society fully embarked in its work. There were reports from the committees on Jurisprudence and Law Reform, on Judicial Administration and Remedial Procedure, from the special committee on Constitutional Amendment (that its proposed judiciary bill had succeeded only in getting introduced and referred), and other committees. A spirited debate was precipitated over a resolution from the committee first named, looking toward memorializing Congress in favor of steps to abolish the distinction between law and equity in the procedure of the Federal courts. In giving its assent to this proposition, the Association vindicated its courage to attempt big things in spite of the failure of its attempt of the previous year upon the Constitution of its own State.

The program of this meeting in the matter of addresses and papers assumed substantially the form which has been pretty generally maintained since that time. There was an address by the President on the year's changes in the statute law, an annual address by Hon. R. S. Walker, of the Commission of Appeals, upon "The Bench and Bar of Early Days in Texas," and papers by A. J. Peeler, Esq., of Austin, and Hon. Robert G. Street, of Galveston.

The former dealt with "The Right of Land Owners of Texas to Protection," a subject of timely interest in view of the fence cutting troubles then constituting a burning issue in the State; the latter with the perennial theme of "Texas Pleading."

Hon. J. H. McLeary, of San Antonio, was chosen President for the ensuing year, and the adjournment was for a meeting in that city in November, 1884.

Limits of space forbid a notice of the proceedings at the successive sessions of the Association. It met, as stated, in November, 1884, at San Antonio; in May, 1885, in Austin; in July, 1886, at Dallas; September, 1887, at Waco; July, 1888, at Fort Worth; July, 1889, at Galveston, and at the same place and in the same month each year thereafter until 1902, when it went to Dallas, and there named San Antonio as its meeting place for the present year. This change in the place of meeting was due to a feeling on the part of a majority of the members that the interests of the Association would be served and its membership increased by bringing it in closer touch with the bar in different parts of the State, and the removal was accomplished with some reluctance, for Galveston had come to seem like the permanent home of the society, and the profession there had been untiring in hospitality and devotion to its advancement.

During the twenty years of its active life it is believed that the Texas Bar Association has accomplished substantial good both for its members and for the State at large. Many interesting addresses have been made and papers read by eminent lawyers. Besides those published in full in its printed proceedings, which have been issued each year for the benefit of its members, the annual reports of its various committees, especially those upon Jurisprudence and Law Reform, upon Remedial Procedure, and upon Legal Education, have brought before it, from time to time, the most interesting problems of legislation affecting our commonwealth, and these reports have been orally discussed in its meetings with zeal and ability by many of the best trained lawyers of the State. As examples, might be cited the full discussion, extending through several successive annual meetings, of the merits of the plan of land registration and

transfer commonly known as the "Torrens system," led by Judge Hill, of Livingston, whose reports from the committee having charge of the subject, with their exhibits in the way of pamphlets and correspondence, furnished a mine of information in regard to the proposed legislation and the practical experience of the working of the law in those jurisdictions where it had been adopted. Also might be mentioned the persistent efforts, but recently crowned with success, of the Committee on Legal Education and Admission to the Bar.

If the recommendations of the Association in regard to legislation have too often met the immediate fate accorded to its first effort in regard to the reform of the judiciary system, this by no means affords a measure of its influence for good. Interest has been awakened and information diffused by intelligent discussion of questions of practical importance in government, and the seed planted has borne fruit and will continue to do so, though the harvest seems sometimes long delayed. Finally, the Association has steadily contributed to the maintenance of a high standard of professional ethics and to the promotion of cordial social relations and many warm friendships among its members.

Though numbering in its list of members the names of many of the most eminent public men of the State, it seems to have become an unwritten law that the Presidency of the Association, which has been justly regarded as one of the blue ribbons of professional distinction, should go, not to judge, or Governor, or Congressman, but to one known almost exclusively for his high rank as a practicing lawyer. By a similar custom, the Vice-Presidency has come to be regarded as the line of promotion to the Presidency. Much of the success of the Association has been due to the faithful services of Chas. S. Morse, Esq., who from the beginning has filled the laborious position of Secretary with zeal and devotion. The sense of loss by his untimely death last year was appropriately marked by a memorial page in the last published proceedings of the organization.

Following are lists of the Presidents of the Association for each year of its existence; also of the persons delivering the respective

annual addresses before it, and of the papers read and their subjects. The committee reports and matters made subject to general discussion, though often most interesting, are too numerous for notice.

PRESIDENTS OF THE ASSOCIATION.

Thomas J. Devine, San Antonio, 1882; T. N. Waul, Galveston, 1882-3; J. H. McLeary, San Antonio, 1883-4; B. H. Bassett, Brenham, 1884-5; A. J. Peeler, Austin, 1885-6; T. J. Beall, El Paso, 1886-7; W. L. Crawford, Dallas, 1887-8; F. Charles Hume, Galveston, 1888-9; H. W. Lightfoot, Paris, 1889-90; Norman G. Kittrell, Houston, 1890-1; Seth Shepard, Dallas, 1891-2; John N. Henderson, Bryan, 1892-3; S. C. Padelford, Cleburne, 1893-4; Thomas H. Franklin, San Antonio, 1894-5; William L. Prather, Waco, 1895-6; William H. Clark, Dallas, 1896-7; William Aubrey, San Antonio, 1897-8; Frank C. Dillard, Sherman, 1898-9; Presley K. Ewing, Houston, 1899-00; M. A. Spoonts, Fort Worth, 1900-01; James B. Stubbs, Galveston, 1901-02; Lewis R. Bryan, Houston, 1902-03; T. S. Reese, Hempstead, 1903-04; H. C. Carter, San Antonio, 1904-05.

ANNUAL ADDRESSES.

1883—Mr. Richard S. Walker, of Austin, "The Bench and Bar in the Early Days of Texas."

1884—Mr. B. H. Bassett, of Brenham, "The Lawyer as a Citizen."

1886—Mr. Sawnie Robertson, of Dallas, "The Death of Chancery."

1887—Mr. C. C. Garrett, of Brenham, "Conflict Between State and Federal Courts as to the Jurisdiction of the Former Over Non-residents."

1888—Mr. F. Charles Hume, Esq., of Galveston, "Execution Process: Should the Legislature Extend It?"

1889—Mr. S. B. Maxey, of Paris, "The Federal Constitution."

1893—Mr. Thomas H. Franklin, of San Antonio, "Judicial Centralization."

1894—Mr. B. D. Tarleton, of Fort Worth, "Some Reflections on the Relations of Capital and Labor."

1895—Mr. O. M. Roberts, of Austin, "The Right and Duty of Coinage by the United States."

1896—Mr. Seymour D. Thompson, of Missouri, "Government by Lawyers."

1897—Mr. N. W. Finley, of Dallas, "Trusts, Combinations and Conspiracies in Restraint of Trade."

1898—Mr. Sam J. Hunter, of Fort Worth, "Life Tenures of Office in a Republican Government."

1899—Mr. F. Charles Hume, of Galveston, "The Supreme Court of the United States."

1900—Mr. William Wirt Howe, of New Orleans, "Roman and Civil Law in the Three Americas."

1904—Mr. Robert G. Street, of Galveston, "Sovereignty."

PAPERS READ.

1883—Mr. A. J. Peeler, of Austin, "Rights of Land Owners in Texas to Protection Against Governmental and Individual Aggression in the Use and Enjoyment of Their Property."

1883—Mr. Robert G. Street, of Galveston, "Texas Pleadings."

1884—Mr. O. M. Roberts, of Austin, "Legal Education and Admission to the Bar."

1889—Mr. O. M. Roberts, of Austin, "Law and Pleading."

1890—Mr. B. H. Bassett, of Dallas, "The Model Brief."

1891—Mr. J. M. Avery, of Dallas, "Liability of an Organizer of a Corporation for Its Acts."

1892—Mr. C. C. Garrett, of Brenham, "Limitation of Actions When There Is a Trustee Authorized to Sue."

1892—Mr. S. C. Padelford, of Cleburne, "Government."

1893—Mr. H. Teichmueller, of La Grange, "The Homestead Law."

1893—Mr. T. S. Reese, of Hempstead, "Criminal Law."

1893—Mr. John G. Winter, of Waco, "Community Law."

1893—Mr. Richard Morgan, of Dallas, "Receiverships."

1893—Mr. James C. Scott, of Fort Worth, "Private Corporations."

1894—Mr. E. B. Perkins, of Greenville, "The Statutory Craze."

1894—Mr. Robert G. Street, of Galveston, "Medical Jurisprudence."

1894—Mr. Edwin Hobby, of Houston, "The Legal Profession: Its Value, Importance and Influence."

1894—Mr. Charles S. Todd, of Texarkana, "Assignments for the Benefit of Creditors."

1894—Mr. Norman G. Kittrell, of Houston, "The Criminal Law of Texas and Its Administration."

1894—Mr. T. H. Conner, of Eastland, "Juries and Jury Trials."

1894—Mr. T. F. Garwood, of Gonzales, "The Respect Due by Members of the Bar to the Judiciary."

1895—Mr. George W. Davis, of Dallas, "Texas Pleadings."

1895—Mr. Wm. H. Clark, of Dallas, "Deeds of Trust Preferring Creditors."

1895—Mr. John G. Tod, of Houston, "Administration of Community Property by the Survivor."

1895—Mr. R. L. Batts, of the University of Texas, "Some Reflections Concerning Legal Education."

1896—Mr. E. J. Simkins, of Dallas, "Proper Subjects of Legislation."

1896—Mr. F. W. Ball, of Fort Worth, "A Desultory Denunciation of Texas Law and Procedure."

1896—Mr. H. Teichmueller, of La Grange, "Judge and Jury."

1896—Mr. A. E. Wilkinson, of Denison, "A Review of Some Recent Noteworthy Decisions of the Higher Courts of Texas."

1896—Mr. John Dowell, of Austin, "The Symbolism of Commerce—Trade Mark."

1897—Mr. Leroy G. Denman, of San Antonio, "Our Present Judicial System: Its Advantages and Defects."

1897—Mr. Joseph Spence, Jr., of San Angelo, "A Review of Recent Noteworthy Decisions of the Higher Courts of Texas."

1897—Mr. M. A. Spoonts, of Fort Worth, "A Divided Allegiance."

1897—Mr. Presley K. Ewing, of Houston, "The De Facto Wife."

1897—Mr. Wm. Aubrey, of San Antonio, "Mob Law."

1897—Mr. B. R. Webb, of Fort Worth, "Some Needed Reforms in Our Real Estate Laws."

1898—Mr. Norman G. Kittrell, of Houston, "Needed Reforms in the Assessment and Collection of Taxes."

1898—Mr. George E. Miller, of Wichita Falls, "Some Features of the Uniform Bankruptcy Law."

1898—Mr. Jonathan Lane, of La Grange, "Our Courts."

1898—Mr. W. A. Kincaid, of Galveston, "In the Known Certainty of the Law Is the Safety of All."

1898—Mr. B. R. Webb, of Fort Worth, "A Review of Recent Noteworthy Decisions of the Higher Courts of Texas."

1899—Mr. T. S. Reese, of Houston, "A Plea for Exactness and Certainty in the Law."

1899—Mr. Edward F. Harris, of Galveston, "Some Recent Noteworthy Decisions in Civil Cases by the Higher Courts of Texas."

1899—Mr. W. C. Wear, of Hillsboro, "Admission to the Bar."

1899—Mr. Philip Lindsley, "Humerous Report of Annual Meeting of the Tennessee State Bar Association."

1900—Mr. J. B. Dibrell, of Seguin, "The Legislative Function."

1900—Mr. J. A. Holland, of Orange, "The White Man's Burden, from a Legal Standpoint."

1900—Mr. A. E. Wilkinson, of Austin, "Law and Literature."

1900—Mr. Edwin B. Parker, of Houston, "Anti-Railroad Personal Injury Litigation in Texas."

1901—Mr. John G. Tod, of Houston, "Recent Noteworthy Decisions of the Texas Courts."

1901—Mr. Norman G. Kittrell, of Houston, "The Barker Case."

1902—Mr. Maco Stewart, of Galveston, "The Story of a Land Title."

1902—Mr. John Charles Harris, of Houston, "Trial by Jury in Civil Causes."

1902—Mr. Yancey Lewis, of the University of Texas, "The Rights of Riparian Owners in the Matter of Irrigation."

1903—Mr. Jno. N. Henderson, of Bryan, "The Pardoning Power, Its Uses and Abuses."

1903—Mr. Jno. C. Townes, of Austin, "Courses of Study in Law Pursued in the State University."

1903—Mr. Jno. C. Walker, of Galveston, "Some Peculiarities of the Admiralty Law."

1903—Mr. Wm. D. Williams, of Fort Worth, "The Taxation of Intangibles."

1903—Mr. C. F. Greenwood, of Hillsboro, "Will Injunction Lie to Restrain the Local Option Law from Going Into Effect?"

1903—Mr. S. J. Brooks, of San Antonio, "The Increase of Litigation in Cities and Some Suggested Amendments to the Practice Act."

1904—Mr. Chas. K. Bell, of Fort Worth, "Certain Needed Reforms."

1904—Mr. Edward F. Harris, of Galveston, "Review of Recent Noteworthy Decisions."

1904—Mr. Alfred E. Wilkinson, of Austin, "The Legal Mind."

1904—Mr. A. L. Beaty, of Sherman, "Impeaching the Verdict of the Jury."

1904—Mr. Jno. C. Walker, of Galveston, "The Harter Act."

1904—Mr. W. M. Coldwell, of El Paso, "Growth of Central Power in the United States."

1904—Mr. Clarence H. Miller, of Austin, "Our Lawmakers—the Judges."

1904—Mr. Ocie Speer, of Bowie, "The 'Texas Rule' in Irrigation."

1904—Mr. Thomas Shearon, of Dallas, "The Vendor's Lien in Texas—an Historical Essay."

1904—Mr. Lewis Fisher, of Galveston, "Needed Amendments of Probate Law."

APPENDIX.

PRESIDENT'S ANNUAL ADDRESS.

DELIVERED BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. T. S. REESE,

OF HEMPSTEAD,

PRESIDENT OF THE ASSOCIATION.

Gentlemen of the State Bar Association:

It is provided by the Constitution of this Association that "the President shall open each meeting of the Association with an address, in which he shall communicate the noteworthy changes in statutory and constitutional law, and especially such changes as affect the development and progress of the law and the administration of justice."

There has been no session of the State Legislature since the last meeting of this Association, at which time the laws passed by the Twenty-eighth Legislature were fully reviewed by your President, with the exception of one act. I will therefore have to stray beyond the exact limits marked out in the Constitution for material for this address.

FEDERAL LEGISLATION.

There have been a special and a regular session of the Federal Legislature since the last meeting of the Association, but a care-

ful investigation of the legislation of both sessions discloses nothing in the way of changes in statutory or constitutional law either noteworthy or of general interest. Both sessions seem to have been devoted very largely, if not exclusively, to "playing politics."

The legislation establishing freer trade relations with the island of Cuba, and that ratifying the treaty with the new Republic of Panama, and providing for the temporary government of the canal zone at Panama, the protection of the canal work, and other purposes, while of great and general importance, do not come within the category of noteworthy changes in the law, prescribed as the subject of this address. Their importance is purely political. Through the legislation with regard to the Panama Canal, it seems assured that the dream of centuries will be realized by the opening of a waterway between the Atlantic and the Pacific oceans,—a work so grand and glorious; fraught with such beneficent results to the whole country, and particularly our section of it, that in the universal rejoicing at its consummation there will be small disposition to criticise any of the means by which it was accomplished.

PROPOSED AMENDMENTS TO THE STATE CONSTITUTION.

The Legislature of the State, at its last session, adopted a joint resolution amending Section 52, Article 3, of the Constitution by adding a provision authorizing legislation whereby any county or subdivision thereof, or any number of adjoining counties, or any political subdivision of the State, or any defined district, now or hereafter to be described or defined, upon a vote of two-thirds of the resident property taxpayers, who are qualified electors, may issue bonds or otherwise lend its credit, in any amount not to exceed one-fourth of the assessed valuation of the real property of the district, for certain purposes of local improvement therein specified.

With reference to this amendment, I may say, in passing, that in my judgment it is questionable whether any further encouragement should be given to the prevalent craze for issuing bonds and mortgaging the future for borrowed money, which is swamping counties, cities, towns and independent school districts with a load of debt which it will take generations to pay. The worst feature of such a course is that it encourages extravagance in expenditures, by relieving the people of all incentives to economy. The time-honored injunction, to pay as you go, which is as sound an economic maxim for governments as for individuals, is becoming obsolete in the mad rush for issuing bonds and borrowing money.

Another resolution proposed is to amend Article 3, Section 51, of the Constitution relating to pensions of ex-Confederate soldiers and sailors, so as to raise the limit of the amount which the Legislature is authorized to appropriate for such purpose from $250,000 to $500,000.

Another joint resolution is to amend Section 16, Article 16, of the Constitution relating to the creating of corporations with banking and discounting privileges.

This amendment to the Constitution was recommended by the Committee on Jurisprudence and Law Reform of this Association in its report at the annual session of 1902, which report was adopted by the Association. The amendment proposed is exceedingly stringent in the matter of safeguarding the rights of the general public in their dealings with such banks, and the conditions imposed upon officers and stockholders are very onerous. The Legislature is required, in authorizing the creation of such corporations, to provide for a system of State supervision, regulation and control.

It is further provided that each shareholder, so long as he owns shares of stock in such bank, and for twelve months after the date of any bona fide transfer thereof, shall be personally liable for all debts existing at the date of such transfer, to an amount equal to double the par value of such stock.

It is further provided that no charter shall be granted until all of the capital has been subscribed and paid in in cash; that no banking corporation created shall engage in business in more than one place, to be designated in its charter, and that no foreign corporation shall be permitted to exercise banking or discounting privileges in this State.

Since the late war national banks have had practically a monopoly of the banking business, the monopoly not being relieved to any appreciable extent by the few private firms and individuals engaging in the business.

Not being allowed to lend money upon real estate, which is the only security held by a large number of our people, who sometimes need temporary accommodation from banks, they are not able to supply such need.

The provisions of the proposed amendment requiring the capital stock to be subscribed and paid in in cash will prevent irresponsible persons from embarking in the business, while the further provisions for State supervision and regulation, and the onerous liability imposed upon stockholders insure a careful and con-

servative conduct of the business, under proper safeguards for the protection of the general public.

I call attention to these proposed amendments in this address, although, as changes in our constitutional law, they are still in fieri. Whether they shall advance further than this stage is a question to be decided by the qualified voters at the next general election, and, introducing as they do important changes in the organic law, intelligent discussion of them is to be desired.

THE TERRELL ELECTION LAW.

In his address at the last meeting of this Association, my predecessor, referring to the act of the Twenty-eighth Legislature, known as the Terrell election law, stated that he did not deem it advisable to undertake to set out any of the features of this law, inasmuch as an address upon that subject would be delivered at that session by Hon. A. W. Terrell, the distinguished author of the law, and, for this reason, no further reference to the law was made by him.

As we were disappointed in regard to the expected address by Judge Terrell, this is still unexplored territory, so far as concerns this address, and I may fairly refer to it as a noteworthy change in statutory law.

The act consists of one hundred and forty-five sections, and there can be no question of its far-reaching importance. Probably no statute ever passed in this State has been so thoroughly and so anxiously discussed, or with a more sincere desire to comply with its provisions, and to avoid its penalties.

It prescribes and regulates the manner of the payment of the poll tax, and the perpetuation of the evidence thereof, to the end that there shall be no cheating or evasion in this regard; the holding of primary elections and conventions for the nomination of candidates, the manner of voting at such elections and conventions, and ascertaining and declaring the result. It regulates the holding of county, district and State conventions, and, coming then to the final step, it regulates, in all their details, the manner of holding elections. The law follows the voter in his downsittings and his uprisings, from the time he starts out to pay his poll tax until he deposits his vote in the ballot box at the final election. Neither election officers, candidates nor party managers are neglected in the meantime, but every part of the machinery of nominations and elections is carefully regulated.

Penalties are provided for violations of the law by tax collectors in the matter of issuing poll tax receipts; by the voter, the candi-

date, and officers of election, and the plain citizen who in his zeal may be tempted to overstep the limits placed by the law upon his activity.

It is not the purpose of this address to enter into a discussion of the various provisions of this law. It has been tried to a limited extent in local elections and in State primary elections, and, so far, there is every indication that when trimmed of some objectionable provisions and licked into shape, favorable results may be reasonably expected from its operation. It is not to be denied that there are many excrescences which should be cut off, and some confusing, inconsistent and contradictory provisions which should be eliminated or amended. These latter are to some extent due to the fact that a large number of amendments were tacked on to the original bill without proper regard to the effect of such amendments upon other sections of the bill than the particular ones so amended. While the core of the law is sound, in attempting to provide safeguards against fraudulent voting and the corruption of the voter, the right of the individual voter to vote for whom he pleases is too much hampered by a mischievous officialism. There is too much "official ballot" and too much "executive committee." The law puts a bib on the voter and directs the executive committee to feed him with a spoon. The author of the bill aimed to eliminate the political bosses, big and little, and to destroy the power of "the machine," but it is doubtful whether the elaborate machinery provided for the nomination of candidates, the power given to State and local executive committees, and the discouragement of the independent candidate and the independent voter, will not operate to build up the machine and add another weapon to the armory of the political boss. As far as possible, party nominations are made neecssary for the most insignificant and purely local offices, and unnecessary impediments are thrown in the way of the citizen who is disposed to cast his ballot according to the dictates of his own judgment and conscience alone.

I can not but regard the tendency to discourage and to condemn independence of thought and action in the citizen in the exercise of the right of suffrage, as altogether vicious, and it seems to me that this law goes too far in this direction—farther than is necessary to secure "a fair election and an honest count," which should be the primary end and aim of the law, and is undoubtedly the purpose of this act. This criticism of some features of the law which I consider objectionable is not made in any unfriendly spirit. The author of the law is known to be a sworn foe to "bossism" and what is known as "machine politics," in all of their forms. In his war upon both, all honest men will bid him God-

speed, and would only assist him as far as possible in getting effective ammunition for his gun. The evils which the law aims to cure are present and palpable and strongly entrenched behind the barricade of long-established custom, and the necessity for a remedy is admitted by all except those who make their profit by the corruption of the electorate. It is to be hoped that all amendments of the law will be directed to simplifying it, eliminating unnecessary restrictions upon individual action, and harmonizing and rendering as clear as possible its various provisions with particular regard to the fact that the law has to be administered mainly, not by lawyers, but by the plain people of the country, who in the main desire an honest election and are entitled to have the law for their guidance made so clear and plain that there will be no need to apply to the Attorney General, or anyone else, to learn what it means.

But after all is done that can be done by the lawmaking body, it is mainly to those charged with the administration of the law that we must look for results, which is, in fact, a truism, and applies to all laws.

When this law is written so plain that ignorance of its provisions can not be urged as even a moral defense, it will have to be vigorously executed.

The political rounders and ward heelers will not be driven from their trade until they find that there is in it more of pain than of profit. They are the kind of animal that can only be effectively persuaded with a club.

Other changes in statutory law introduced by the Legislature at its last session are fully covered by the able address of my predecessor at the last meeting of this Association.

As this address, as to length, is still well within the limits allotted by custom, I make no apology, except to the Committee on Jurisprudence and Law Reform, upon whose domain I may be trespassing, for a brief reference to a subject which has lately evoked considerable discussion by other State Bar Associations and individual lawyers, which, indeed, has been the subject of argument and discussion, sporadically, for a hundred years, and is here now referred to more for the purpose of provoking investigation and discussion than anything else.

NON-UNANIMOUS VERDICT IN CIVIL CASES.

The subject is the repeal of the law requiring that a verdict of the jury in civil cases, in the district court, can only be rendered by unanimous agreement, leaving in operation the provision of the

Constitution that such verdict may be rendered by the concurrence of nine of the jury.

By way of premise, I call your attention to the provision of the Constitution of this Association which establishes as one of the objects of the Association "the advancement of the science of jurisprudence." By jurisprudence is here meant, I take it, the whole domain of the law, both substantive and remedial.

It is to the lawyer that practicable measures of reform, either in substantive law or procedure, first suggest themselves, and this Association will fall short of the primary object of its organization and existence if it fails or refuses through mere indifference to give proper attention to any practicable measure which fairly promises "to advance the science of jurisprudence."

The common jury plays so important a part in the administration of the laws; such vast interests are daily submitted to its arbitrament in civil cases in the trial courts, that no effort should be spared, nor suggestion ignored, to make this part of the machinery of the law as nearly perfect in its working as can be done with any human institution.

Trial by jury, in civil cases particularly, has had its critics as well as its defenders, but every effort to disturb it only serves to fix it more firmly as a part of the judicial machinery. As a school wherein the citizen may learn something of the laws of his country, and be made to feel and appreciate something of the weight and responsibility of the duties which rest upon him as an instrument of the government, no adequate substitute has been, or indeed can be, devised, nor in the mere matter of deciding questions of fact has human experience yet proposed a system, upon the whole, so satisfactory, notwithstanding imperfections which do not inhere in the system as necessary elements thereof, but are mere excrescences which may be removed without harm or injury to its essential features.

Trial by jury is a right to be carefully guarded, not a fetich to be worshipped with blind, unquestioning devotion.

The requirement of a unanimous verdict is not an essential part of the system. It has been the law in England since trial by jury assumed finally, by slow evolution, substantially its present form, and for that reason alone it is entitled to the presumption, prima facie, that it is a sound principle and should not be changed, but this presumption is not conclusive, otherwise there could be no such thing as advancement in jurisprudence.

There has not been lacking at any time vigorous opposition to

this requirement on the part of lawyers whose opinions should carry great weight.

Investigators into the origin and early history of trial by jury seem to be agreed, that in its earliest form it was simply a trial by compurgators, whereby a man to sustain his right to land brought up witnesses to testify as to his long continued possession, from their own knowledge. In order to prevail he was required to bring up twelve of his neighbors who would make oath as to his right. If out of those first brought up by him, certain of them were not able to support his claim, from want of knowledge or otherwise, he was required to bring up others until the requisite number of twelve were secured. This was called "afforcing the assize" or jury, and it appears that afterwards when by slow gradations such changes were introduced as to assimilate the jury to something like its present form, whereby it became a body of men selected to decide issues of fact upon the testimony of other witnesses as well as from their own knowledge, this practice of afforcing the jury by adding others to the original twelve, until as many as twelve could be found to agree upon a verdict, was continued.

The next step was to limit the jury to the number of twelve, of whom less than the whole number, and perhaps a bare majority, could return a verdict. It is stated that not until about the fifteenth century was the requirement that a verdict must be the result of the unanimous agreement of the jury, finally established.

To secure this unanimity, and as a part of the system, methods were adopted which must be considered as without sense or reason, if not positively barbarous. The jurors were shut up without food or water, fire or candle, until such time as they should all agree, or at least come into court and say that they were agreed, and instances are not wanting where the recalcitrant minority were persuaded with the threat of fine and imprisonment; and the practice of bullying and abuse from the bench, in order to force an agreement, seems to have been considered a quite natural, if not necessary, part of the system. The law required unanimity, and unanimity must be had by some means. If we are asked to preserve the principle of unanimity simply because it is of such ancient origin, why not jump the intervening years and go back to the really "old times" before the modern innovation of discharging the jury if they failed to agree, and compel unanimous verdict by cold and starvation, actively assisted by threats of fine and imprisonment, as in the old time?

Such was the origin of the unanimity rule, and it has persisted more through an unreasoning conservatism and the inertia of indifference than from any intelligent approval of the doctrine.

Trial by jury simply grew by slow advances from the rudest beginnings, as a substitute for the trial by battle, the ordeal of fire and water, and the trial by compurgators, which was its original and rudest form, to a certain point, and stopped at the point where the jury shall be composed of twelve men, properly selected, whose verdict must be arrived at by unanimous agreement.

No man believes that if a highly civilized people, as our own for instance, uninfluenced by tradition and unhampered by previous systems, were now to devise a system of jury trial, whereby the decision of questions of fact in the trial of cases at law was submitted to the judgment of twelve laymen, the requirement that their decision should only be arrived at by unanimous agreement would be seriously considered.

I can not do better than quote from a learned and scholarly paper read before the Wisconsin Bar Association at its meeting last year by Hon. George Clementson, Circuit Judge:

"The unanimity rule is generally condemned by writers upon jurisprudence who have expressed themselves upon it. Eminent judges have spoken against it. Bentham declared that if trial by jury had been the offspring of an enlightened age, the number of the members of a jury would have been an odd number, with power to the majority to decide. Hallam declared the requirement of unanimity to be a 'preposterous relic of barbarism.' Mr. Justice Brewer, in his address before the Yale students two years ago, spoke of it as 'a relic of a semi-barbarous age.' Mr. Justice Miller said that the system of trials by jury would be 'much more entitled to the confidence of the public, as well as of the legal and judicial minds of the country, if some number less than the whole should be authorized to render a verdict.' Judge Cooley spoke of this rule as 'repugnant to all experience of human conduct, passions and understanding.' In England, as long ago as 1831, the commission appointed to report upon the courts of the common law, and which had upon it some of the ablest lawyers in the kingdom, reported upon this subject that the method of trial by jury should be changed so that after a jury had deliberated a fixed number of hours without coming to a unanimous agreement, if nine of them concurred they should render the verdict. No action was taken upon this recommendation, probably because the necessity for the change was not strongly felt by the bench or bar of a country where it is part of the province of the presiding judge not only to instruct the jury in the law but to guide them to a proper conclusion upon the facts,—in nearly every case tried the verdict of the jury being but an endorsement of the expressed opinion of the judge.

"If we could cast out from our minds the impression made by the practice, familiar to us from our youth up, of requiring the body known as the jury to all agree to the same thing in order to decide, it would strike us as absurd that a bench of judges, who have had long training in the investigation of legal questions, and in analyzing and weighing evidence, need not be unanimous in making a decision, but that twelve jurymen unlearned in the law, inexperienced in weighing testimony, of widely different mental training and capacity, some of them unused to continued mental application, must be kept together in a jury room after a case is given to them, until they shall come into court and say by their verdict that they all see alike; something we know to be seldom true."

Writing to a member of the Constitutional Convention of New York in 1867, Dr. Francis Lieber argues very strongly for the abolition of the requirement of unanimity of the jury in criminal cases as well as in civil cases.

"Long ago," writes Dr. Lieber, "I gave (in my 'Civil Liberty and Self-Government') some of the reasons which induced me to disagree with those jurists and statesmen who consider unanimity a necessary and even a sacred element of our honored jury trial. Further observation and study have not only confirmed me in my opinion, but have greatly strengthened my conviction that the unanimity principle ought to be given up, if the jury-trial is to remain in harmony with the altered circumstances which result from the progress and general change of things. Murmurs against the jury-trial have occasionally been heard among the lawyers, and it is by no means certain that without some change like that which I am going to propose, the trial by jury, one of the abutments on which the arch of civil liberty rests, can be prevented from giving way in the course of time." (6 American Law Register, page 727. See also Proffatt on Jury Trial, Section 79.)

Hardly a writer on the subject of jury trials can be found who commends the rule requiring unanimity in the verdict, while most of them are emphatic in their condemnation of it as unwise and inexpedient, and express the opinion that it could never have been adopted as a part of the system of jury-trial except by the slow and gradual process by which the trial by jury has attained its present form. In Forsyth's History of the Jury, the arguments against unanimity are summed up, and the author concludes:

"But, whatever may be the practice of other countries in this respect, it would perhaps be not difficult to prove that it is better to allow the opinion of the majority to prevail in both civil and criminal cases, than to demand unanimity in the former. The

time is fast approaching, if it has not already come, when trial by jury, like every other part of our legal fabric, will become the subject of public criticism, and I feel persuaded that then it will be found impossible to justify or retain a rule which is opposed to both justice and expediency. The unanimity of twelve men, so repugnant to all experience of human conduct, passions, and understandings, could hardly in any age have been introduced into practice by a deliberate act of the Legislature." (Forsyth's Trial by Jury, pages 203-215.)

The only argument that has ever been made; indeed, the only argument that can be made, for the rule is that a verdict agreed to by the whole number of a jury is more apt to be correct than one by agreement of a majority, or a less number than the whole.

Some ingenious individual has undertaken to figure out the whole matter according to fixed and certain mathematical rules and by algebraic formula, showing just exactly the relative chances in favor of the correctness of a verdict rendered by agreement of the whole number of the jury, and of a less number than the whole. This, of course, is entirely fanciful. The only thing that can be properly said is that upon the theory that a jury of any definite number of men is competent to decide issues of fact in the trial of cases at law, and is an instrument useful for that purpose, generally a fact believed from the evidence to be true by all of them is more apt to be true than if it were believed to be true by only some of them, and false by the others.

But the same argument may be used in favor of unanimity in the decision of every other question of law or governmental policy upon which citizens, in greater or less numbers, and in whatever capacity, are called upon to pass, and if the benefits of such a rule fairly outweigh its inconvenience and other disadvantages, we would find it adopted in the private business of the world where men associate themselves together in furtherance of common enterprises and for the accomplishment of common objects. This, however, we find not to be the case, and it may really be said that in no other business, public or private, except that of deciding issues of fact by a jury is unanimity either required or expected.

The law only aims at relative certainty, recognizing that absolute certainty is impossible of attainment.

But if we could be sure that the unanimous agreement of the jury, as to the facts which they are called upon to decide, would remove all doubts as to the truth of the facts as found, do we really secure this result when we receive a unanimous verdict? In other words, is the verdict under the rule requiring unanimity the result always of a conscientious agreement on the part of all of the jurors, in

fact, as it is in theory? We know that it is not; we know that it is not even generally so. We know that in the large majority of cases involving any difficulty or complication in the facts, or serious contradiction in the evidence, in various ways and by various means, a minority of the jury is brought to agree that a verdict may be returned as the verdict of the jury to which neither their judgment nor their consciences agree. This is sometimes the result of indifference, sometimes of a lax conscience and sense of duty, but sometimes also, and in case of honest and conscientious men, it is the result of a dislike to be considered obstinate, or a distinct recognition of the very principle for which contention is here made that the majority is very likely to be as nearly right as is required by the law, at any rate, more likely to be right than the minority.

This is really the reason we have no more mistrials in civil cases. If every juror stood firmly by his own convictions, which certainly he ought to do, if after fairly considering the arguments of those differing with him he still thinks he is right, in my judgment, in a majority of cases involving any difficulty or complications in the facts or contradiction in the evidence, there would never be a verdict. Most verdicts are, in fact, like the one reported in Farrell vs. Henessy, 21 Wisconsin, 639:

Upon a poll of the jury, one of them, a singularly conscientious man, announced, "It was and is my verdict, but it is contrary to my conscience. I only consent to it because all the rest have given in for the plaintiff." The verdict so given in was received and recorded as the unanimous verdict of the jury. See also, Gose vs. The State, 6 Texas App., 121; Mitchell vs. Parks, 26 Ind., 354; Black vs. Thornton, 31 Ga., 641; Wyley vs. Bull, 41 Kans., 206.

In fact, the books are full of cases in which it appears that a verdict was rendered and received as the unanimous verdict of the jury, but which it was clear was not in accordance with the conscientious convictions of each juror, thus really evading, by judicial construction, a rule that should be abolished. I have no doubt whatever that in a large majority of cases the verdict of the jury returned into court, and accepted as settling the facts in the cases, is arrived at in the same way. There is no real agreement of all the jurors that the verdict is right, or is "a true verdict," but only an agreement that it may be returned as such, which, it must be admitted, is bad in morals, if not in law.

The unanimous verdict, in a majority of cases, is a legal fiction, about as real, so far as it represents the honest convictions of every member of the jury, as the conversion of heretics in the middle

ages under the influence of the rack and thumb-screw of the Inquisition.

It is no answer to this to say that the jurors are not, and can not be, compelled to agree. The fact remains that they are influenced by various considerations other than their honest convictions to do so. And sometimes it will happen,—oftentimes does happen,—that it is the majority which gives in, and the unanimous verdict represents the honest convictions of a minority only.

This is assuming that each juror is honest, in the sense that he is not bribed or bought, or influenced by bias or prejudice or other improper motive. When this is not the case with even one of them, the result is either a mistrial or a forced verdict—the result of compromise, and not the honest verdict of any one of the jury.

That this actually occurs in a large number of cases, resulting in mistrial, is a matter of common experience. How often the presence of one or two or three prejudiced or dishonest men upon the jury, in connection with the rule requiring unanimity, results in a compromise verdict, which, in fact, is not approved by any member of the jury, we have no means of knowing. Jurors themselves would be loath to impeach their own verdict and impugn their own fairness and honesty by admitting that they had agreed to a verdict which they did not believe to be "a true verdict." But in the very nature of things this must frequently occur, and we have often indubitable evidence that it has occurred in the return of verdicts that can not be accounted for in any other way. When jurors are all unprejudiced, unbiased and not influenced by any personal feeling or motive, their indifference and desire to have done with a disagreeable duty prompt them to yield their own opinion when in a minority, often at a sacrifice of their own honest convictions.

On the contrary, when the personal equation of bias, prejudice or other personal feeling or motive comes in, affecting, not the judgment so such as the action of a minority of the jury (and it is seldom that such influence will affect more than a minority), we have a failure to return a verdict, unless the unprejudiced; that is, the honest and conscientious majority, gives in rather than have a mistrial, which really sometimes occurs.

If either a fictitious and simulated and not a real and genuine agreement, or a hung jury brought about by the operation of prejudice or bias, or other improper motive arousing to action the personal feeling; or worse than either, an active and interested minority controlling the majority and forcing a verdict through their personal indifference, be oftener found to occur, than a genuine, honest, and sincere agreement of all the jury, then the only possible

argument for the unanimity rule must fall, and that one or the other of these does actually occur in a large majority of civil cases is not only according to actual experience, but, reasoning a priori, from the essential nature of things, must occur.

I consider it one of the strongest arguments against the rule requiring unanimity that, while it is admitted to be practically impossible that twelve honest men, with unbiased and unprejudiced minds, would arrive at the same conclusion as to the truth to be found from a complicated mass of oftentimes conflicting and contradictory evidence, the only alternative presented is for the minority to sacrifice their honest convictions by agreeing with the majority to return a verdict which is, in fact, contrary to their oaths to return a "true verdict," or to abide by their own convictions, with the result of a mistrial, and the consequent waste of time, labor, and money expended in the trial. Of the two evils, I think the latter really the least. Both can be avoided by providing that a majority may return a verdict, and can be very greatly ameliorated by providing that two-thirds or three-fourths of the jury agreeing may do so.

The unanimity rule seems to be firmly fixed in England, where, however, it does not operate so badly by reason of the practice of summing up of the evidence by the judge, with its assistance to, and influence with, the jury; but even there there has not been lack of vigorous opposition to its continuance.

In Scotland in very early times there were jury trials in civil and criminal cases, a majority of the jury only being necessary to return a verdict. Afterwards juries in civil cases were discontinued, until the Act of 55 George III, Chapter 42, which introduced into that country the trial by a jury of twelve men in civil cases with the common law provision for unanimity of the jury. This, however, met with decided opposition, and by a later act it was provided that in civil cases, if all of the jury did not agree in three hours, nine of them concurring might return a verdict.

From earliest times the jury in criminal cases in Scotland has been composed of fifteen, a majority of whom might render a verdict.

The common law jury of twelve, all of whom must agree to the verdict, is the rule in the Federal courts, and in most of the States, but the rule requiring unanimity has been changed in some of them by constitutional and statutory provisions.

In Connecticut and Iowa, by agreement of parties before final submission, verdict may be returned by majority in civil cases.

The Constitution of Minnesota authorizes the Legislature to provide for a verdict by agreement of five-sixths of the jury.

In Nevada, Washington, Idaho, South Dakota, Utah and Arizona three-fourths of the jury agreeing may return a verdict in civil cases, and in Montana, in civil cases and in criminal cases less than felony, two-thirds concurring may do so.

In some other States where the unanimity rule is adhered to, by the Constitution, the Legislature is authorized to provide for a verdict by agreement of less than the whole number of jurors in civil cases. Curious inquirers are referred to a very full note to the case of State vs. Bates, 43 L. R. A., 33, which shows very fully the statutory and constitutional provisions of the different States on the subject.

It appears that the disposition to change the rule of the common law is stronger in the new States of the West, which is readily accounted for by the fact that the people of those States, being less influenced and hampered by long-established custom and tradition, felt freer to adopt such system of law and procedure as commended itself to their own enlightened judgment.

The older Commonwealths took their common-law jury system from the mother country, and took it straight, and it has long since become consecrated by age, both form and substance. Indeed, it early became a rule of decision, which has continued, that constitutional provisions with regard to trial by jury, unless it is otherwise expressly provided, are to be construed to mean trial by jury of twelve men, who can return a verdict only by unanimous agreement.

This was the rule under the Constitution of the Republic of Texas, and all of our State Constitutions until that of 1876, which has the following provision on this subject:

"In trials of civil cases, and in trials of criminal cases below the grade of felony in the district courts, nine members of the jury concurring may render a verdict, but, when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors, not exceeding three, may die or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict."

In the Constitutional Convention of 1875, the preparation of a judiciary article was left to a committee, of which Hon. John H. Reagan was chairman, the committee being composed of the ablest lawyers in that body. The draft of an article was presented by Judge Ballinger, which was adopted with sundry changes. Incomplete drafts were presented by other members of the committee,

none of which, however, contained any provision inconsistent with the provision presented by Judge Ballinger, above quoted, with regard to jury trial, and, although there was a great contrariety of views with regard to other provisions of the judiciary article, there seems not to have been any objection made to this, and it was adopted as a part of the judiciary article without criticism or dissent, except that an amendment was offered by one member (Mr. Weaver), providing that a majority of the jury might return a verdict in civil cases, and another (by Mr. Erhard) that nine of the jury agreeing might return a verdict in civil and criminal cases.

This remained the law in Texas for only a few months; certainly not long enough to determine whether it would be satisfactory.

By an act "to regulate grand juries and petit juries in civil and criminal cases in the courts of this State," passed August 1, 1876, under the authority conferred by the Constitution to change the constitutional rule, the Legislature provided:

"No verdict shall be rendered in any cause in the district court whereby the rights of any citizen shall be affected, except upon the concurrence of all the jury (unless during the trial one or more of the jurors, not exceeding three, may die or be disabled from sitting; in which event the remainder of the jury shall have power to render the verdict), but, when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it." (Chapter 76, Acts Fifteenth Legislature, Sec. 19.)

This did not pass without vigorous opposition. The bill was introduced and passed in the Senate, but in the House of Representatives the above quoted section was stricken out by amendment, and it was only by way of a compromise of the disagreement between Senate and House as to many provisions of the act by report of a free conference committee that this provision was finally incorporated in the act.

It appears then that all that will be necessary to incorporate in our law a provision that nine members of the jury agreeing may return a verdict in civil cases, and in criminal cases less than felonies in the district court is to return to the provisions of the Constitution by repealing that portion of Section 19 of the act above referred to, which was incorporated in the Revised Statutes of 1895 as Article 3231.

It may be that objection will be made to any change in the law that will authorize less than the whole number of the jury to return a verdict in misdemeanor criminal cases, on the part of some

of those who would favor such a provision with regard to civil cases. While my personal views are that the provision of the Constitution just as it stands is both wise and expedient, it is really with reference to civil cases in the district court that a change in the present rule is here suggested, and while I can see no objection to such a change as would allow a bare majority of the jury; that is, seven out of the twelve, to return a verdict, to require nine to concur would obviate, practically, most of the inconvenience arising from the present rule, and would, on the whole, be satisfactory to those who oppose the unanimity rule. This was the view that prevailed in the Constitutional Convention of 1875, and that has been adopted in those States that have departed from the common-law rule requiring unanimity.

What is here said is more by way of suggestion, for the purpose of provoking and stimulating thought and discussion upon the subject than for any other purpose. There can be no question that there obtains to a considerable extent among lawyers a disposition to change the present rule, based upon the opinion that it is, as expressed by Judge Brewer, "a relic of a semi-barbarous age."

That there is not outside of the bar any popular demand for the change or popular dissatisfaction with the present law, if it be true, affords no argument in favor of a continuance of the present rule if the change suggested be in fact an improvement. All advancement in the science of jurisprudence has begun—must begin —with lawyers.

Trial by jury is the heart and vitals of our judiciary system. Every year of added experience has only brought to me, and I think to lawyers generally, clearer and more unquestioning realization of its value, both as a school for the citizen, where he not only learns something of the laws of his country, but is brought to realize the responsibility resting upon him as a constituent factor in its government; and, also, as an instrument for the decision of issues of fact in the trial of cases. If the rule requiring unanimity in the jury is a weakness or imperfection in the system, it will only serve to establish the system of trial by jury more firmly in its essential particulars, to remove this non-essential feature. At any rate, lawyers are invited to investigate and discuss the suggestions here presented.

These views are not original. They have been reiterated many times by the ablest lawyers and judges of this country and in England, and are the result of common experience of the practical workings of the jury system in civil cases under the present rule requiring a unanimous agreement of the jury.

There is a common, though not universal, agreement among

those who advocate the abolition of the unanimity rule that it should be retained in criminal cases, of the grade of felonies at least, for which various reasons are advanced, the most important of which appears to be that a change in the rule as to criminal cases would run counter to the long established, and it appears to me fundamentally correct idea, that the right of the citizen to life and liberty, rights which are inherent and which he does not get from the law, are too sacred to be taken away except upon the unanimous agreement of a jury of twelve men as to the truth of the facts upon which it is claimed that he has forfeited them.

SOVEREIGNTY.

THE ANNUAL ADDRESS DELIVERED BEFORE THE

TEXAS BAR ASSOCIATION,

JULY 14, 1904,

BY

HON. ROBERT G. STREET,

OF GALVESTON.

Mr. President and Gentlemen of the Texas Bar Association:

The subject to which I invite your attention is "Sovereignty." It has been truthfully said that most of the disputes among men would disappear in the light of clear definition, and of such as should remain much the larger part would be found to rest on differences so fundamental in their nature as on their mere statement to preclude the possibility of agreement.

Sovereignty is far from being understood in so universal a sense as not to share, in some measure, in this judgment, but it is believed better to let the treatment of the subject disclose the sense in which the term is here used before it is undertaken to crystalize its concept by definition.

It may be urged against the utility of discussing the subject of sovereignty at all that the term itself, born of the struggle with feudalism, is synonymous with absolutism, and that it has no application to modern forms of government distinguished by Constitutionalism, Federalism or Imperialism; that it no longer has a place in political science and should be eliminated from its terminology. But since political scientists, characteristically the most advanced thinkers, so far from adopting this view, themselves continue the discussion with unabated vigor, a mere lawyer addressing

lawyers, proverbially inclined to the old and slow to adopt the new, may be pardoned for saying, still

> "Thou come'st in such a questionable shape
> That I will speak to thee."

The discussion of sovereignty involves three principal questions; first, its origin; next, its content, and, finally, its location. On each of these there is wide diversity of opinion among publicists and legists, both on abstract theory and concrete application, or the relation of such theory to different forms of government, and even to governments of the same form.

Theoretical views in political science are so liable to be unconsciously influenced by one's environment, as by the form of government prevailing where the writer has principally lived or studied, and which is thus constantly objectively presented to his mind's eye as the test of the soundness of theory, that the views of foreign writers on sovereignty, or those deeply imbued with their theories, require the most discriminating care to determine their value, either abstractly considered or in their application to other countries. Moreover, there is in every country an atmosphere of sympathy with its institutions a stranger can neither share nor understand.

In the brief exposition here undertaken, no reference will therefore be made to foreign writers, except the most limited to the English and French, who alone could have exercised any influence in the formative period of this government, and whose views may be regarded, to some extent, as generative of our own conceptions.

Popular sovereignty or government by the "consent of the governed" is far from being the modern idea many suppose. We find it mentioned in the politics of Aristotle, thus: "The will of the prince has the force of law, since the people have transferred to him all their right and power." But it derived its real vigor from its assertion in mediæval times as the source of the authority of the State against the claim made by the church of supremacy over all. As early as the thirteenth century it was a political axiom that voluntary submission of the people was the foundation of all just government. The theory of the "social contract" itself—destined to play so many parts on the world's stage—generally attributed to Rousseau, had been stated with great clearness nearly two centuries before his time. But very different consequences were deduced from its earlier and later teachings, mainly because in the one case it was asserted by the State or king against the claim of the church, while in the other it was made by or on

behalf of the people against the king or other agency exercising the powers of government. As asserted by the prince, there was deduced from it as a necessary corollary that it was unlimited, indivisible and perpetual; and as claimed by or on behalf of the people it carried with it the limitation of "reserved rights." It was so effectively used by the "judicious" Hooker in the age of Elizabeth in defense of the established Church of England against the claim of the Catholic Church to divine authority in its institution, that the origin of the doctrine is sometimes associated with his honored name. He denied direct divine guidance to any religious body and claimed that government had been formed by the "consent of the governed" for the purpose of substituting law and order for lawlessness and violence, and hence laws for the government of the church might be made by men and, if not contrary to the scriptures, they were authorized by God.

The "sceptic" Hobbes claimed in his Leviathian, 1650, that men had been driven to resort to the "social contract" by the natural state of war in which they were born; that therefore there was nothing voluntary in the act and that it operated a complete surrender of all natural rights and became both illimitable and irrevocable. Hence he deduced those doctrines, so acceptable to monarchical power, that the sovereign can do no wrong towards his subjects or be punished by them. Though invented in defense of monarchy, the "social contract" theory has generally found more congenial soil in democratic or popular government. The famous definition of sovereignty given by John Austin, Jurisprudence, 1836, is, "If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent." This definition is not universally accepted, unless with the implied understanding that customary law becomes by acquiescence the command of a determinate superior, which really opens the door for the examination of the long and strenuous opposition offered by Bentham and Austin to Sir William Blackstone's views on the sources of law and the consequences thereof in his "Commentaries on the Laws of England."

Naturally the "social contract" theory played a very important part in the English Revolution. James II was hedged about by such divinity that it required the declaration embodied in the preamble of the act of his deposition to reconcile the people to so revolutionary a measure. It reads: "The King, James II, having endeavored to subvert the constitution of the kingdom, by breaking the original contract between the king and the people * * *

has abdicated," etc. Locke, who was the champion theorist of the English Revolution, though denying the idea that man in the state of nature was ever without rights and duties, gives by far the most logical exposition of the "social contract" theory; and his views exerted a powerful influence on both English and American thought. Prof. A. Lawrence Lowell, "Essays on Government," 1889, says: "In reading Locke we can not fail to be struck with the resemblance between some of his deductions and the doctrines of our own jurists; and we might almost suppose that the Treatise on Government was intended to be a commentary on the principles of American constitutional law. For, in fact, the idea that a statute which conflicts with the Constitution is invalid and has no legal effect, was by no means a pure invention on the part of Chief Justice Marshall, as has often been supposed, but is a very natural development of certain principles of the English common law."

Rousseau's "Contrat Social" was published in 1762. No other human document ever so powerfully affected the destiny of mankind. The soil was ready for the sowing. Unhappily in France the violent wrench from the theory of the Bourbon dynasty, as expressed by Louis XIV in the phrase, "I am the State," to a just recognition of popular rights, was too great to be made without causing the horrors and excesses of the French Revolution, bearing within them the seeds of inevitable reaction. Guizot has said that although France has no exclusive monopoly in originating ideas for the enlightenment of mankind, yet, before such ideas can be effectively disseminated throughout the world, they must first be irradiated by the divine glow of the genius of the French people.

It was so with the theory of the "social contract," and, though Rousseauism was nowhere, not even in France itself, accepted in its totality, yet there was no civilized State but felt its influence; no throne but was shaken by it to its very foundation. Before it the theory of "divine right" as the source of monarchical governments was forever swept away, and henceforth the question of the location of sovereign power came only to be considered as between the people themselves and the agencies or instrumentalities of government, either instituted by them or suffered to exist by their will.

In America these ideas were thus set forth in the Declaration of Independence, "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." But although the fathers were

deeply imbued with the political ideas of popular or democratic government that were being diffused at that epoch throughout the world by France, they were too long accustomed to English laws and institutions adapted to their own genius to be swept into the excesses of the French. And it is only by an attentive consideration of the reciprocal effects of the revolutionary principles imbibed in a measure, on the one hand by the fathers from the French theorists, and their conservatism in action derived from their heredity on the other, that the development of civil and political liberty in this country can be intelligently traced. The thought applicable to the Americans in this relation is sometimes expressed in the terms, "radical in theory but conservative in practice."

The same year that gave to mankind the great American Declaration, besides witnessing Watt's invention of the steam engine, introducing the industrial revolution, and the publication of Adam Smith's "Wealth of Nations," saw also the publication of Bentham's "A Fragment on Government," attacking Blackstone's Vinerian lectures at the University of Oxford (included later in his Commentaries), a few of which Bentham himself had attended. Blackstone had indeed expressed himself in very guarded terms on the "social contract" theory in his introduction on the study of law. Said he: "But though society had not its formal beginning from any convention of individuals, actuated by their wants and their fears; yet it is the sense of their weakness and imperfection that keep mankind together. * * * And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of the State, yet in nature and reason must always be understood and implied in the very act of associating together." Again: "How the several forms of government we now see in the world at first actually began is matter of great uncertainty, and has occasioned infinite dispute. It is not my business or intention to enter into any of them. However they began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the jura summi imperii or rights of sovereignty reside."

Blackstone places the sovereignty in England in king and parliament, though, as the veto has not been applied in three centuries, it might, practically, from his point of view, be said to reside in parliament. In the essentially unlimited character of sovereignty Blackstone, Bentham and Austin were agreed. "Supreme power limited by law," said Austin, "is a flat contradiction." He held sovereignty in England to be in "the king, peers and the electoral body of the commons."

It is an interesting fact that the only two actual instruments known in the world's history corresponding with the theory of the "social contract," at one time almost universally adopted, should have sprung from a kindred source. The first of these was signed by all men on board the "Mayflower," November 11, 1620. It provided: "We doe by these presents solemnly and mutually in ye presence of God, and one of another, covenant and combine ourselves together into a civill body politick, for our better ordering and preservation," etc. The other is contained in the preamble of the Constitution of Massachusetts, 1780, and runs as follows: "The body politic is formed by a voluntary association of individuals; it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."

The opposing centralization and particularistic theories were present in the formation of the Constitution of 1787. Liberty was associated with the idea of local self-government, while centralization was believed to be hostile to free government, and yet the necessity of strengthening the proposed general government was urgently felt, owing to the acknowledged weakness of the confederation. The American experiment in this Federal type of government was the first in history. It has since been most prominently followed by the Swiss union under the Constitutions of 1848 and 1874, and the German empire under the Constitution of 1871. The constituent elements of these associations had in each instance previously enjoyed independent sovereign powers. Naturally, inquiry into the relations existing between such governments themselves and the States they embrace has been greatly stimulated thereby; especially have the nature of sovereignty and the place where, or body in which, it resides become the sources of increased speculation by political scientists and jurists.

In the papers composing the Federalist, written in advocacy of the adoption of the Constitution, there was the clearest recognition of a "divided sovereignty." Neither the State nor the Federal government was to be supreme, the one toward the other, yet each to be sovereign within its sphere. This exposition came at a time when already both in England and on the continent of Europe a consensus had been reached, after much controversy, as to the impossibility of a "divided sovereignty." "But," said De Tocqueville, in his "Democracy in America," 1835, "the Americans have constituted a government that is sui generis; there are two sovereignties, the Union and the States." "The rules of logic," said he, "are broken. * * * A people which should divide its sovereignty into fractional parts in the presence of the great mili-

tary monarchies in Europe would, in my opinion, by that very act abdicate its power, and, perhaps, its existence and name."

Beginning with the case of Chisholm vs. Georgia in 1792 and running through an unbroken line of decisions of the State and Federal courts down to the present, this doctrine has been enunciated substantially in these terms: "The United States are sovereign as to all powers of government actually surrendered. Each State in the Union is sovereign as to all the powers reserved." This view was never questioned by Mr. Webster. In the course of remarks in the United States Senate, June 27, 1850, he said: "That the States are sovereign in many respects nobody doubts; that they are sovereign in all respects nobody contends. The term sovereign or sovereignty does not occur in the Constitution of the United States. The Constitution does not speak of the States as sovereign States. It does not speak of the government as a sovereign government." Elsewhere, however, he speaks of the term itself as inapplicable to our form of government, and says, "All power is with the people."

Webster and his great rival Calhoun both regarded government as a mere agency exercising its various functions and attributes through its different departments. It was this idea which made the sovereignty of the Union and the States compatible by attributing ultimate sovereignty to the people. Calhoun, however, entirely rejected both the "social contract" theory and the doctrine of "divided sovereignty." In like manner he rejected the theory of contract between the States and the general government, and held each State to be sovereign.

"Sovereignty," said he, "is the supreme power in a State, and we might as well speak of half a square or half a triangle as of half a sovereignty." He did not consider his position, however, as forbidding the delegation of the execution of certain sovereign powers to a common agency, the Union. It would be impossible to do justice to Mr. Calhoun's theory by any summary that would be at the same time brief and intelligible. I quote the following from a not too partial sketch of his life in the New International Encyclopedia as indicating the place assigned him in history: "His power of logical analysis * * * seems to entitle him to rank as our most original political theorist; he was probably too much of a doctrinaire to be held a statesman of the first order. It must be conceded, however, that throughout his long political career he impressed both friends and foes as only a man of extraordinary powers can do, and it is quite clear that he really believed that the only way to preserve the Union, which he dearly loved, was to reduce its strength almost to the vanishing point."

He was indeed, as Jefferson Davis said, "a devoted lover of the Union of the Constitution." He did not fear a dissolution of the Union because he did not believe it possible. He believed that all the forces, political, moral, patriotic, commercial and social, fostered by the Union, would so strengthen it that its dissolution need never be apprehended.

What he really feared was the subversion of the Federal Union of sovereign States provided for by the Constitution, by a consolidated Union of subject States; and believing local self-government essential to the preservation of liberty itself, he argued the necessity of preserving the sovereign character of the State that the Union contemplated by the Constitution might itself be preserved. It was not a union merely, but the Union he wished to see preserved. Doubtless this may justly be called the Southern point of view. It was the view of such men as Jefferson Davis and Alexander H. Stephens and many others. But Mr. Calhoun's doctrine of nullification and his theory of concurrent majorities were never generally accepted in the South; indeed, they were too abstruse ever to have been generally understood. With him they all formed but parts of a system of political philosophy.

Nullification itself was to be resorted to only in the most extreme case, and then as in the nature of protest and for the purpose of eliciting expression in like manner from the other States of the Union to operate as a check upon what might be the exercise of despotic power by a temporary majority in control of the several branches of the government in the mad excess of partisan passion or for sectional advantage. So far from this doctrine ever having obtained general acceptance in the South, nullification was generally regarded both by the people and public men of the South with strong disfavor and as smacking of treason. This is not surprising, because they looked upon it as an independent act and a permanent status, whereas Calhoun looked upon it as a temporary measure and as part of a system devised to secure a return to the constitutional limitations of power.

Remembering how Mr. Webster was denounced in his own State on account of his vote on the fugitive slave law of 1850, embittering the two remaining years of his life, it is not without something akin to pity—though it be but a scant acknowledgment of the justice of history—that we read from the "Life of Webster," by Henry Cabot Lodge, successor to his seat in the United States Senate, the following reflections on the argument of the great "expounder of the Constitution" in behalf of the existence of a strong centralized or consolidated Union, deriving its powers directly from the people and not from the States: "The weak places in

his armor were historical in their nature. It was probably necessary, at all events Mr. Webster felt it to be so, to argue that the Constitution at the outset was not a compact between the States, but a National instrument, and to distinguish the cases of Virginia and Kentucky in 1788 and New England in 1814, from that of South Carolina in 1830. The former point he touches upon lightly, the latter he discusses ably, eloquently, ingeniously and at length. Unfortunately, the facts were against him in both instances. When the Constitution was adopted by the votes of States in popular convention, it is safe to say there was not a man in the country, from Washington and Hamilton on the one side to George Clinton and George Mason on the other, who regarded the system as anything but an experiment entered upon by the States, and from which each and every State had the right peaceably to withdraw, a right which was very likely to be exercised."

Though the ordinance of the convention of South Carolina, November 24, 1832, declaring the tariff acts of 1828-32 "null and void," was the only attempt ever made to exercise nullification as a constitutional right, reserved pursuant to the Kentucky resolutions of 1798 by Jefferson and the Virginia resolutions of 1799 by Madison—occasioned by the alien and sedition laws—yet, irregularly, the right has been several times asserted, as in Pennsylvania in 1809 by resisting a mandate of the Federal court, and by the resistance of the New England States to the embargo act and to enlistments for the war of 1812.

The first words in the preamble of the Constitution of the Confederate States are: "We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent Federal government," etc., March, 1861. The corresponding provision of the Constitution of the United States reads, "We, the people of the United States, in order to form a more perfect Union," etc.—words, the fruitful source of woes unnumbered.

A clear idea of the distinction between political and legal sovereignty would avoid much of the confusion that exists in the discussion of this subject. Political sovereignty is that power in a State that is ultimately obeyed, and in a republic it is in the people, those exercising the elective franchise or the popular vote. Legal sovereignty is the governmental agency through which this voice expresses itself; which may or may not at any given time accurately represent it.

Judge Cooley, in his "Constitutional Limitations," says: "The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority." Again,

referring to the political maxim that government rests upon the consent of the people, he says, "What are we to understand by the people as used in this connection? * * * As a practical fact, the sovereignty is vested in those persons who are permitted by the Constitution of the States to exercise the elective franchise."

President Woodrow Wilson of Princeton, "The State," 1901, speaking of Austin's definition of sovereignty, says: "It would seem to follow that our own Federal authorities are sovereign. They are a determinate body of persons to whom the bulk of the nation is habitually obedient and who are themselves obedient to no human superior. But then what of the authority of the States in that great sphere of action which is altogether and beyond dispute their own, which the Federal authorities do not and can not enter, within which their own people are habitually obedient to them, and in which they are not subject to any earthly superior? It has been the habit of all our great writers and statesmen to say that with us sovereignty is divided. But the abstract sovereignty of which the legal analyst speaks is held to be divisible; it must be whole. Analysts, therefore, are driven to say that with us sovereignty rests in its entirety with that not very determinate body of persons, the people of the United States, the powers of sovereignty resting with the State and Federal authorities by delegation from the people."

Mr. Fiske, in his "American Political Ideas," thus concludes a fine tribute to the master minds that framed the American system of federalism in the Constitution: "It was the finest specimen of constructive statesmanship the world has even seen." And, referring to the close of the Civil War, he says: "Such has been the result of the first great attempt to break up the Federal Union in America. It is not probable that another attempt can ever be made with anything like an equal chance of success. Here were eleven States geographically contiguous, governed by groups of men who for half a century had pursued a well-defined policy in common unity among themselves and marked off from most of the other States by a difference far more deeply rooted in the groundwork of society than any mere economic difference—the difference between slave labor and free labor. These eleven States, moreover, held such an economic relationship with England that they counted upon compelling the naval power of England to be used in their behalf. And finally it had not yet been demonstrated that the maintenance of the Federal Union was something for which the great mass of the people would cheerfully fight. Never could the experiment of secession be tried apparently under fairer auspices; yet how tremendous the defeat. It was a defeat that

wrought conviction, the conviction that no matter how grave the political questions that may arise hereafter, they must be settled in accordance with the legal methods of the Constitution as provided and that no State can be allowed to break the peace. It is the thoroughness of this conviction that has so greatly facilitated the reinstatement of the revolted States in their old Federal relations; and the good sense and good faith with which the Southern people, in spite of the chagrin of defeat, have accepted the situation and acted upon it is something unprecedented in history and calls for the warmest sympathy and admiration on the part of their brethren of the North. The Federal principle in America has passed through this fearful ordeal and come out stronger than ever, and we trust that it will not again be put to so severe a test. But with this principle unimpaired, there is no reason why any further increase of territory or of population should overtax the resources of our government."

The juristic idea expressed in decisions of the highest courts of the country, corresponding with the general trend of thought among the people and by those prominent in public life, is to the effect that the nature of the Federal Union has not otherwise been affected by the result of the war between the States except as expressed in the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution. These changes may be briefly summarized as the abolition of slavery, prohibiting the States from making laws which shall abridge the privileges or immunities of any citizen of the United States or deprive him of life, liberty or property without due process of law, or deny to him equal protection of the law, and prohibiting discrimination by the States with respect to the right to vote on account of race, color or previous condition of servitude. To this summary should be added the renunciation contained in the Constitutions of the Southern States of the right of secession, so elegantly expressed in the Constitution of Texas of 1869, "That the heresies of nullification and secession, which brought the country to grief, may be eliminated from future political discussion," etc.

Said Chief Justice Chase in delivering the opinion of the court in Texas vs. White, 7 Wallace, 1868: "The Constitution in all its provisions looks to an indestructible union, composed of indestructible States." And, again, in the County of Wayne vs. Oregon, in 13th Wallace: "Without the States in union there could be no such political body as the United States."

In the Slaughterhouse cases, 16th Wallace, 1872, the court, speaking through Mr. Justice Miller, declares that the Fourteenth Amendment protects from hostile legislation of the States only

such privileges and immunities as enure to citizens of the United States as such, as distinguished from the privileges and immunities they enjoy as citizens of the States. That these are such as arise from the essential National character of the National government and from the terms of the Constitution and laws and treaties in pursuance thereof. "Since these amendments, as before," declares the court, "sovereignty for the protection of life, property and personal liberty rests alone with the State." The Slaughter-house cases were decided by the Supreme Court of the United States before the State governments of the South had been resumed by the real citizenship of the country and while the dominant idea, the aftermath of the war, in every branch of the Federal government, responsive to the demands of the victors, was to secure permanently what were called the fruits of the war—meaning in truth permanent sectional supremacy—while, in short, though the conflict of arms was over, there yet prevailed the strongest determination on the part of the victors to permanently incorporate in the Constitution, in legislation and in judicial decision, their own views and construction of the nationalization of the Union. This was the probable intention of the political branch of the government in the submission of the Fourteenth Amendment as disclosed by the debates in Congress. It was a construction which, once made, would never have been reversed either by political action or judicial decision. It was one from which the country was only saved by a five to four decision. It was the danger point. The country stood then to be irretrievably committed to the overthrow of the State governments, from which it was but a short step —sure to be taken in some alleged exigency—to imperialism, or to a declaration of their continued autonomy. Each recurring year has confirmed and strengthened the wisdom of the result then reached. There is no reason to believe that the people of any one State in the Union would now less jealously maintain the exercise of its sovereign powers, so-called, than those of another. Since the abolition of slavery there is no objective for party alignment on the theory of strict or liberal construction of the Constitution.

As has been said by Mr. Bryce (American Commonwealth, 1893-1899), though the different views of construction have been claimed as the foundation of the alignment of the two great political parties, the claim can not be historically substantiated. And he refers to the Louisiana purchase by Jefferson, and the position of New England on the embargo acts, as showing that it is the view entertained of the merits of the proposition that determines the attitude of the party on the rule of construction and not the latter that controls the former. Indeed, in the electoral commission of

1877 the two great political parties of the country changed position on the question. And, as regards the extension of Federal power, the last candidate of the Democratic party for the Presidency himself proposed an amendment to the commerce clause of the Constitution as broad and general as the "casing air."

That what has been said of the danger in which the country stood at the time of the decision in the slaughterhouse cases, may not be thought an over-statement, I subjoin the following preliminary remarks from the opinion of the court: "We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States have been before this court during the official life of any of its present members. We have given every opportunity for a full hearing at the bar; we have discussed it freely and compared views among ourselves; we have taken ample time for careful deliberation, and we now propose to announce the judgments which we have formed in the construction of those articles, so far as we have found them necessary to the decision of the cases before us, and beyond that we have neither the inclination nor the right to go."

And the question to be decided was thus stated: "Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?"

Said the court in conclusion: "The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it can not be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late Civil War. It was then discovered that the real danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the general government. Unquestionably this has given

great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government. But however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not se in those amendments any purpose to destroy the main features of the general system.

"Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the nation. But whatever fluctuation may be seen in the history of public opinion on this subject during the period of our National existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between the State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or any of its parts."

Said Bradley, justice, dissenting, with whom concurred the chief justice, and Justices Field and Swayne: "The amendment was an attempt to give voice to the strong National yearning for that time and that condition of things in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation."

Thus it will be seen by how narrow a margin the country escaped the conversion feared by Mr. Calhoun into a "consolidated Union of subject States."

Before the Civil War there was no other argument against the Southern view of the construction of the Constitution of the United States except that represented by Mr. Webster, and if that is now admittedly unsound, then, it would seem, the construction contended for by the South should be admitted to have been right.

But since this verdict of history against Mr. Webster's argument there has arisen an after judgment advocacy seeking to assign other grounds to sustain his conclusion. This school of writers may be considered as divided into two classes, one represented by the late Dr. Francis Lieber and the late President Woolsey of Yale, the other by Profs. J. W. Burgess and C. Edward Merriam.

The following extract from Woolsey's preface to the third edition

of Dr. Lieber's work on "Civil Liberty," 1874, will sufficiently indicate the position sought to be maintained by Dr. Lieber and himself. He says: "We are coming, too, to believe in a more liberal construction of the general Constitution so as to throw larger power in the hands of Congress and to look to the government for help in difficulty. * * * The tendency plainly is toward a more centralized government by a freer interpretation of the United States Constitution."

Says Prof. Burgess, "Political Science and Comparative Constitutional Law," 1891: "There is a growing feeling among our jurists and publicists that, in the interpretation of the Constitution, we are not to be strictly held by the intentions of the framers, especially since the whole fabric of our State has been so changed by the results of rebellion and civil war. They are beginning to feel, and rightly, too, that present conditions, relations and requirements should be the chief consideration, and that when the language of the Constitution will bear it, these should determine the interpretation."

Prof. C. Edward Merriam, "American Political Theories," 1903, says: "The great weight of his argument (meaning Mr. Webster's) was due to the fact that even if his interpretation of 'We, the people,' was denied, it did not follow that his conclusions were not sound. His power as a controversialist really came, not from the strength of his constitutional arguments as such, but from the fact that he followed a great current of public sentiment, springing from the impulse of nationality. He had with him the reasoned and unreasoned forces of an ethnic and geographic unity struggling toward self-expression."

In "American Political Theories," Prof. Merriam frequently refers approvingly to Prof. Burgess' theory of "ethnic and geographic unity," and the consequences deduced from it in its application to the United States. Reviewing historically the formation of the Constitution, Prof. Merriam says: "In more recent times there has been in America a decided tendency to react against the early 'protection theory' of government, and to consider that the aim of the State is not limited to the maintenance of law and order in the community and defense against foreign foes. In the new view, the State acts not only for the individual as such, but in the interests of the community as a whole."

The recent tendency shown by political theorists, scientists and economists to deal with practical questions of statesmanship is, to my mind, one of the most encouraging signs for the future welfare of our country. But a few months since a body of eminent

political economists and scientists, the American Economic Association, with a membership, mainly from the foremost institutions of learning, of twenty from the Eastern and Western States to one from the South, met in New Orleans and gave Christmas week to the consideration and discussion of the practical agricultural problems, peculiarly of Southern interest, instead of devoting the time to well-earned rest. But a few years since President Hadley, of Yale, in an address "on Economics and Politics," delivered before the same association, urged as a public duty of professional economists the taking an active part in the discussion of public questions falling peculiarly within their province. Of particular interest to members of the bar is the admirable brochure of Pro. H. C. Adams, "Economics and Jurisprudence," 1897, treating specially the want of structural adjustment in society resulting from the failure of the law to keep pace with economic development. And of very special interest to them is the criticism of John Graham Brooks, "The Social Unrest," 1903, on the legal travesty enacted by the courts in undertaking to apply to suits for damages for personal injuries sustained by employes in the use of modern machinery, moved by steam and electric power, rules that originated in an age of primitive industrial development when every workman owned his own tools and the motive power was his own hands; and the mass of metaphysical subtleties with which the trial judge is compelled to overwhelm the jury in such cases.

The great danger felt at the time of the adoption of the Constitution of the United States was from the too great centralization of power in the Federal government. Hence, only upon the clearest necessity, then apparent, was power or jurisdiction vested in it. And when we consider that it was but an experiment, and the first of its kind, made by sovereign governments jealous of their powers, to say that our experience of more than a hundred years, with the vast changes in social, industrial and commercial life which have taken place, has developed no occasion for increasing or adding to such powers, is to acknowledge oneself the victim of a superstitious veneration for the Constitution that removes the subject from the realm of discussion. Such changes, so far from being made in disregard of the federal character of the Federal government, still conforming to the theory that that government is one of delegated powers, should be made to perfect that system in the light of experience.

So, too, limitations on legislative power by State Constitutions, due to the revolt against monarchical systems of government, should

be regarded—the first instance in which a people have sought to place restrictions on their own powers. In Texas the tendency to these restrictions was further emphasized in the Constitution of 1875 by the reactionary influence that dominated the convention consequent on the era of corrupt carpet-bag rule that had held sway during the period of reconstruction.

Unquestionably the reservations and limitations restricting Federal and State power deprive those governments of the ability to devise on behalf of the people such wise measures of statesmanship as by ethical and economic political development are coming more and more to be recognized as having their foundation in the right of the community considered as a whole and qualifying the particularistic or individualistic theories that dominated political thought at the time of their adoption. Very few truths are eternal; very few rights unchangeable. The limitations of the American Constitutions have not tended to foster the loftiest statesmanship. Of the half dozen greatest measures of reform and political advancement, all in the interest of the masses, that have been adopted by the British parliament within the past fifty years, it is believed not one is within the powers of Congress; and some of them, notably the Gladstone Irish Land Act of 1881, not within the power either of the State or Federal government. Still, it is earnestly to be hoped, though present and prospective conditions demand for both State and National statesmanship a broader field, that this result may be reached by amendments of the Constitutions bestowing such powers as may be needful, and not by judicial legislation wresting their terms from their true, received and approved significance. Such additional powers as shall have been shown desirable by experience should be conferred with all the amplitude required by the purpose aimed at, not to be afterwards quibbled away by construction.

Undoubtedly the disposition formerly manifested by political scientists and economists to content themselves with mere abstractions, went far to justify the slur implied by the term "doctrinaire," applied to them by men of affairs. The instances mentioned are but indications of a general and most hopeful tendency among scientists to study the economic and political development of the country and seek to give them right direction. It is in this aspect, and not from any conviction of the soundness of their views, that the advent of such eminent thinkers as have been named into the domain of applied political science is hailed with pleasure.

The contention of Dr. Lieber and the late President Woolsey, briefly stated, is that in construing the Constitution the controlling

considerations should not be historical, or what was intended or contemplated by the founders, but rather that which has been accomplished should be allowed to speak for itself; that the organic unit created, together with all the powers and functions which circumstances have disclosed as essential to the maintenance of its integrity and the exercise of its sovereign powers, is what should chiefly be regarded.

Mr. Bryce, "American Commonwealth," says that the safety of the republic is above the Constitution, and if it can not be secured otherwise then the Constitution must be evaded or overridden, and adds this is what happened in the Civil War, as Mr. Lincoln frankly avowed.

Profs. Burgess and Merriam have developed what may be called a physical theory of construction; also largely irrespective of constitutional limitations. They regard the people of the United States, as an "ethnic and geographic unity," defined as "a homogenous people, inhabiting contiguous territory, having a common language, literature and institutions and conscious of a common destiny." Prof. Burgess defines a nation as "an ethnic unity inhabiting a territory of a geographic unity," and a State as "a particular portion of mankind viewed as an organized community." Such a National State, he says, is "sovereign; original, absolute, with universal power over the individual subject and all associations of subjects." He argues that the United States constitute such a National Teutonic State. He maintains that the power of the sovereign can not be limited, and says in that case that that which imposes the limitation is itself sovereign. He adds: "A National State is the most modern product of political history, political science and practical politics." He avows the highest political morality in the obedience of such a State to the natural laws of its own integrity and development, superior to all conventional, constitutional or contractual obligations.

Commenting on the Slaughterhouse cases, Professor Burgess says: "From whatever point of view I regard the decision of the court in the Slaughterhouse cases—from the historical, political or juristic—it appears to me entirely erroneous. It appears to me to have thrown away the great gain in the domain of civil liberty won by the terrible exertion of the nation in the appeal to arms. I have perfect confidence that the day will come when it will be seen to be intensely reactionary and will be overturned."

Unless our Constitutions, State and Federal, are made more responsive by amendment to the advanced political ideas of the rights of society, to later modifications of the Eighteenth century theories

of individual right by enlightened ethical views developed by a new industrial life; unless the Federal government shall be vested with such adequate power to deal with every National requirement of our commercial, manufacturing and transportation interests as changed conditions have disclosed to be essential; unless our State governments shall maintain with dignity and efficiency their sovereign powers—so often vain-gloriously asserted, but abdicated in practice —for the preservation of life, liberty and property, we must expect socialistic agitation and Federal aggression in their worst forms, with grave cause of dread for the results of the denial of justice. Or, shall we supinely wait until, urged on by the popular voice, and sustained by the arguments of advanced political scientists in favor of the existence of higher laws of ethics than constitutional obligations and of inevitable physical development, some court by a five to four decision shall subvert State autonomy, and with it constitutional liberty in the land? "Shew me a penny. Whose image and superscription hath it?" They answered and said, "Cæsar's." "Render, therefore, unto Cæsar the things which be Cæsar's."

Mr. President and gentlemen, I have rapidly sketched the rise and development of the doctrine of sovereignty; have noted the various phases assumed by the social contract theory and its correlative, the consent of the governed; have directed your attention to the opposing views of the construction of the Constitution of 1789; to the results of the war as disclosed by the amendments and their construction as established in the Slaughterhouse cases; to the renunciation of the right of secession by the Southern States and to the historical vindication of their position on that issue. I have invited your attention to the limitation of individual right by the rights of society under new conditions of industrial life, and to the vast increase of our commercial interests emphasizing its National character, demanding constitutional changes that will conform our fundamental law to existing conditions and the requirements of future progress; I have brought before you the theories of an ethical and physical growth advanced by eminent political scientists and proclaimed superior to all constitutional obligations, and now, in the light of these considerations, I ask whether the adaptation of our organic law to modern progress can longer be safely postponed? Can the legal profession afford to decline to recognize its peculiar obligation in this behalf?

SOME NEEDED REFORMS.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

C. K. BELL,

ATTORNEY GENERAL OF TEXAS.

My object in preparing and presenting this paper has been and is to endeavor to enlist the more active assistance of the members of the Texas State Bar Association in particular, and of the legal profession throughout the State in general, in bringing about certain needed reforms in our laws which seem to have been overlooked to a large extent, or rather to which the proper importance does not appear to have been attached.

When I make this appeal to the lawyers, I do so advisedly, for what reform has ever been accomplished to which they have not largely contributed? What advance has ever been made in civil liberty in which the lawyers have not lent their aid?

Behold the triumphant sweep of civilization through the centuries! See the glorious bar leading the van and pointing the way onward and upward to all safe and solid progress. The faithful and gratefully recognized guardian of all true human liberty, ever ready to welcome the worthy, ever anxious to recognize the deserving, recruiting continually its ranks from the ambitious in all walks of life, demanding of its members the highest standard of personal integrity and professional honor, the broad views, the disciplined mind and educated skill of the bar have always been dedicated to the administration of justice, to the preservation of order, to the enforcement of law, to the defense of the institutions of civilization and to the promotion of the betterment of the condition of mankind.

When, therefore, we hope to be of service to our State by assisting to direct thought in what we regard as the proper channel and thereby helping to procure what we believe will be beneficial legislation, we turn to the legal profession as confidently as the Musselman turns to the rising sun.

Many of the problems presented by changing conditions have been satisfactorily solved by the people of this State as they have arisen.

Among these are the disposition of the public lands, the control and regulation of common carriers and the prohibition of trusts, monopolies and agreements in restraint of trade.

None of these were solved at the first effort, and doubtless experience will disclose still other defects in the statutes enacted in relation to them which will have to be cured by amendments, but for all practical purposes I think we may safely assume that the problems mentioned are settled, so far as that can be accomplished by State laws.

Many important matters for legislation will occur to everyone, but recent official experience and observation have called my attention to two subjects which demand immediate action.

The first is the necessity of legislation to equalize the burdens of taxation, and the other is the crying need of safeguards to prevent the abuse of corporate privileges granted under our laws, and the injurious use in this State of those granted elsewhere. I propose to present some observations on these subjects in the order in which they are named.

The Constitution of this State provides that "taxation shall be equal and uniform, and all property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law."

This mandate of the Constitution imposes upon the Legislature the duty of providing some method by which all property within the State shall be compelled to bear its just proportion of taxation, but our Legislatures have been singularly derelict in this particular, however commendable their action has been in other respects.

In a new and comparatively undeveloped country, the properties which are available for taxation are necessarily almost exclusively such as are visible; that is, real estate and corporeal personal property, but as improvements take place, new objects of wealth, which we will designate as "intangible assets," are developed which are of great value.

As we have no law under which these intangible assets are assessed, it must appear to all that those of our citizens whose property can not and does not escape taxation are thereby subjected to unjust discrimination and rank injustice. This will appear more clearly by considering a few examples.

Recently, in taking the testimony of the auditor and of other officers of the Pacific Express Company in a case pending in this State, the fact was disclosed that for last year the business of the company in Texas yielded it a net profit of $36,065.92. That is, after deducting all expenses of operating the business of the company in this State, including the amounts paid for ad valorem and occupation taxes, to the railroad companies for transportation, the proportional share of the general expenses of operating the system which are properly chargeable to that part of the business done in Texas, depreciation of property, losses from defalcation, etc., the income of the company exceeded, for the year 1903, the outgo by the sum stated. The report of this company to the Railroad Commission shows that it owned, during the same year, of taxable property in the State of Texas, including horses, wagons, safes, buildings, etc., only $30,076.90. That is, as shown by the officers of the company, it derived as a net revenue from its operations in Texas during last year an amount largely in excess of the total value of its property in the State during that time. Manifestly such a result is absurd. As a matter of fact, its property in the State was many times greater than the amount invested in corporeal personal property and real estate. This property is what we have referred to as its "intangible assets," and these "intangible assets" are as much property as are its horses or wagons and should have been taxed in the same proportion.

Now let us assume that the property of the concern in Texas is capitalized at an amount which would yield a revenue of 6 per cent per annum. This, it will be observed, would be $601,098.66. If we deduct from this amount its visible property, $30,076.96, we find that there is left $571,021.76 as the proportion of the property of the company which represents its "intangible assets," upon which no taxes have been paid.

Let us now compare the tax burden borne by this company with that of some one who owns either city property or farm lands or stock, or, in fact, any property that can be seen and can not, therefore, escape assessment. Assuming that such person will realize from his possessions a net return of 6 per cent per annum, he would have to own and pay taxes on property of the value of $601,098.66 to obtain the same income that the express company earned,

whereas the latter has only had to pay taxes on property of the value of $30,076.90.

The conditions of inequality in the enforced contributions to the support of the government which have been shown prevail to substantially the same extent in favor of the three other companies which do an express business in Texas, and in the same manner, though for lack of proper data it can not be determined to what degree, in favor of telegraph, telephone, insurance, guaranty and surety, sleeping car, stock car and other companies whose principal office is maintained elsewhere but which make a profit from their property used in this State.

While, as I have stated, the data is not available to enable one to demonstrate the exact extent to which most of the companies just named escape taxation in Texas, still facts are known which show that some of them do so to a very large extent.

The reports of the railroad companies of the State to the Railroad Commission show, among other things, that many and probably all of the Texas roads lease a considerable portion of their rolling stock. For instance, the Missouri, Kansas and Texas Railway Company of Texas last year paid for hire of equipment $209,-140.69. This item must not be confounded with the amount paid on cars used in through shipments, or, as it is called, for car service, for which, during the same time, that company paid $143,-266.32 more than it received for the use of its cars by other companies.

While we can not ascertain the exact value of the property for the use of which the road mentioned paid the enormous sum stated, still there are some facts of which we have knowledge which will enable us to do so approximately.

There is one honorable exception to the rule that the foreign corporations which have leased their rolling stock to Texas railroad companies have avoided taxation upon it. Last year the Chicago, Rock Island and Pacific Railway Company rendered the rolling stock which it had leased to the Chicago, Rock Island and Texas and to the Chicago, Rock Island and Mexican Railway Companies, and paid taxes on it at a valuation of $144,782, and for the use of this property it received from these roads the sum of $70,382.74.

By a calculation it is found that if the compensation received by the companies which leased their rolling stock to the Missouri, Kansas and Texas Railway Company for the year 1903 bore a like proportion to its value as did that which was received by the Rock Island to the value of the rolling stock leased by it, then the value

of the property leased by the Missouri, Kansas and Texas Railway Company for the year mentioned was $428,738.

This immense amount of property was in this State, it received the protection of our laws, it occasioned a part of the expense which the protection of all property involves, and taxes ought to have been collected from its owners as they were from others.

If all the companies which had leased rolling stock to the different railroads in Texas had rendered for taxation for 1903 the property so leased, the taxable values of the State would have been increased thereby many millions of dollars.

When we pass laws under which property of the character under consideration will be taxed, we will venture on no experiment. Other States have been doing for years what it is suggested we should begin to do, and the validity of the taxes imposed has been sustained not only by the State courts but by the Supreme Court of the United States.

The laws of Pennsylvania, imposing a tax on the intangible assets of a sleeping car company, were upheld by the Supreme Court of the United States in the case of Pullman Palace Car Company vs. Pennsylvania, 141 U. S., 18. Similar laws with reference to a telegraph company were sustained by the same court in the case of the Western Union Telegraph Company against Taggart, 163 U. S., 1, and likewise, the laws of Ohio, providing for the assessment of taxes on the intangible assets of express companies, were upheld in the case of Adams Express Company against Ohio, 165 U. S., 194, and also the same case reported in 166 U. S., 185.

Other concerns which have not had to pay taxes upon their intangible assets in Texas are the street car, electric light, gas and similar companies. The information necessary to enable one to calculate the values of these assets is not obtainable, but they must amount to a great deal, and, as our cities grow, they will greatly increase.

The method adopted in most other States for arriving at the value of these properties is this: The income of a company is ascertained, and from this the operating expenses, including the amounts paid for taxes, for street privileges, etc., are deducted. It is then determined for how much the balance thus ascertained could be capitalized at a given rate. From this amount the value of the corporeal hereditaments belonging to the company is deducted, and the remainder is the value of its intangible assets which are subject to taxation.

In some instances the capitalization of the company is adopted as a basis for the calculation, as thus: A street car company, we

will say, has outstanding stock to the amount of $100,000, on which it pays annual dividends of 6 per cent, and bonds to a like amount on which it pays interest at the rate of 4 per cent per annum. The stock and bonds each sell at par. The corporation has personal property and real estate of the value of $100,000. The intangible assets of the company subject to taxation then are $100,000.

In other States the valuation is based upon the capital stock of the concern to be taxed, but whichever of the methods adopted be the most satisfactory, they are all based on the just rule that the value of property is determined by its earning power for the purpose of taxation as well as of sale.

It is very important that we should pass laws which would render possible the proper assessment of intangible assets at an early day, not only because of the revenue we would derive in consequence of them as soon as they became operative, but because these sources of taxation will increase rapidly in the near future.

In view of the fact that laws embodying the principles suggested have been in force elsewhere, and have been so universally upheld, it will naturally occur to some to ask why like laws have not been enacted in Texas. No satisfactory reply can be given to this question, but we can reasonably hope that our citizens will not much longer be deprived of the benefit of this act of tardy justice.

Our laws under which renditions of property for taxation are made require amendment in another respect. It must be known by all that a large part of that portion of property which consists of money and of that which is represented by what is called credits, that is, of claims for money or other valuable things, is not assessed.

The extent to which this is the case is appalling. The report of the Comptroller shows that for the year 1903 the amount of money assessed for taxation other than that of banks (which is rendered separate from that of other persons, firms and corporations) amounted to only $9,764,767.

It must be borne in mind that the law expressly provides that the term "money" or "moneys" for taxation shall, besides money or moneys, include every deposit which any person owning the same is entitled to withdraw in money on demand. Hence, a deposit in a bank, subject to be withdrawn on demand, constitutes, within the meaning of the taxing laws, money.

The report of the national banks transacting business in Texas discloses the fact that the individual deposits with those institutions on November 25, 1902, amounted to $65,006,668.96, and on February 6, 1903, to $67,939,117.51. It is impossible that the de-

posits could have varied materially from these figures on the 1st of January, 1903. It appears, therefore, that for each dollar of money actually rendered for taxation last year, there was nearly seven dollars in the national banks alone on which taxes ought to have been but were not paid.

To put the proposition in another form: If all the $9,764,767 of money rendered for taxation for 1903 was a part of the individual deposits with the national banks, still there were over $55,000,000 of money with these institutions alone, the owners of which failed to contribute their share towards the support of the government.

When we recall that there are many private and some State banks engaged in business in Texas, and that a very small proportion of our citizens deposit their earnings with banks of any kind, the extent to which money, as defined in our laws, escapes taxation becomes apparent.

However, I will go still further into details. I do this in the hope that, by bringing home to you a knowledge of conditions as they exist, I may be able to make a more permanent impression than I could by dealing in general terms.

For the year 1903 there was rendered for taxation in Tarrant County money, other than that of banks, to the extent of $187,915, which was less than one-half the amount of individual deposits in either of the national banks in Fort Worth and less than 6 per cent of the total individual deposits in the six national banks of that city, and this though there were at that place several other large and prosperous banking institutions.

Like conditions prevail generally. In Bexar County, for instance, the amount of money other than that of banks assessed last year was $89,005, which was less than one-sixth of the individual deposits in the bank which had the least deposits of either of the five national banks in the county, and less than 2 per cent of the individual deposits in the national banks alone of San Antonio.

In other words, for each dollar of money in Bexar County which was rendered for taxation for 1903, there was represented by the deposits in the national banks in the county over fifty-seven dollars on which taxes should have been but were not collected.

These illustrations will suffice to indicate somewhat the extent to which those whose property consists of money evade the payment of their just dues to the Government, and by similar illustrations it could be shown that the owners of what is called "credits" do so to a much greater extent.

In a preceding portion of this paper it has been made to appear

that a very large volume of valuable property goes untaxed on account of the omission from our laws of provisions under which they could be properly assessed, and changes in our taxing system were suggested which, if their adoption could be secured, would, it is believed, assist in equalizing our tax burdens.

Nothing was or could be said in censure of the owners of this property because they do not pay what the law should have compelled but does not compel them to pay.

The responsibility for the injustice which results from the defects in the laws is on the Legislatures. If our lawmakers see proper, by their failure to make provisions for the assessment of property, to continue to exempt it from taxation, its owners are in no wise to blame if they accept the gratuity.

Far different is the case of one who is under legal obligations to contribute a just portion of his income or earnings to the support of the Government under whose protection he lives, and who can escape his obligations only by devious methods.

What would be the emotion of the tax dodger, if his sensibilities had not been blunted by the equivocations through which he has deceived the assessor, when he realizes that his neighbor is staggering under burdens which he ought to have helped to lessen?

What must be the feelings of one who, having properly rendered for taxation his possessions, learns that others have increased his burdens by improperly avoiding theirs?

Would not a sense of resentment rankle in his breast over the injustice to which he had been subjected?

And can not there be, and shall there not be done something to place the conscientious man on an equal footing with one who is not so?

Is the fact that a man is conscientious to be allowed to continue to be a handicap upon him in the race of life?

Surely not. What, then, are the additions to our laws which are necessary to compel some of the owners of money and credits to do as a matter of compulsion what others do as a matter of conscience?

The law should be so amended as to require each person assessed to swear how much he had on deposit subject to be withdrawn on demand on the 1st day of January of the year to which the assessment relates, and that he had no more than the amount stated.

As to credits, the person to be assessed should be required to furnish a sworn statement showing the total amount of debts which was owing to him on the first of the year, the amount of such debts which were collectable, and that he owned no other debts which were

collectable and the amount of his indebtedness at that time to others.

In this way the information would be available upon which to base a prosecution for perjury if a false statement should be made.

I claim no credit for originality in these suggestions as they, if adopted, would be merely the application in our State of laws which have prevailed elsewhere for years.

There may be, and doubtless are, many other defects in our tax laws which should be cured, but those which I have endeavored to point out seem to me to be the most glaring and to call most urgently for immediate attention.

If there be one branch of our laws which, more than any other, requires complete remodeling it is that which relates to private corporations.

While there have been amendments to the statutes under which corporations other than those organized for certain purposes, such as building railroads, doing an insurance business and the like are formed, they have undergone no substantial change since they were enacted in 1874.

In the meantime conditions have been revolutionized, and safeguards which were formerly thought to be sufficient to prevent the abuse of the privileges granted to incorporators have proven to be utterly inadequate.

Before attempting to show that this is the case, I desire to submit a few observations of a general character with reference to the subject under consideration, which will not, I hope, be inappropriate.

A corporation is an artificial person, created in this country, at least, directly or indirectly by the legislative power. It has no rights except such as are conferred by law. A charter can be issued on any terms and with any restrictions and subject to any requirement which the granting power may see proper to impose.

Charters are not granted to corporators for their benefit alone, but they are granted principally because it is supposed that the exercise of the rights conferred will redound to the benefit of the public.

If the privileges granted to a corporation should prove to be injurious, or if they should be so used as to result in injury, they should be recalled, and if by any character of requirements or species of restrictions the possibility of their injurious use can be lessened, such requirements and restrictions should be provided.

Our Constitution provides that "general laws shall be enacted providing for the creation of private corporations, and shall therein

provide fully for the adequate protection of the public and of the individual stockholders."

The Legislatures of Texas have complied with the obligations imposed by the section of the Constitution just quoted to a very satisfactory degree, so far as corporations for railroad and insurance purposes are concerned, but as to other corporations they have totally failed to provide adequate protection either for the public or for the stockholders.

Under the laws of this State three or more persons can organize a corporation for any of the various purposes for which corporations are permitted to be formed by presenting to the Secretary of State a charter in proper form and showing that 50 per cent of the authorized capital stock has been subscribed and 10 per cent paid in. The incorporators can pay back to themselves, in the shape of dividends, the 10 per cent, or they could pay in the 10 per cent of the authorized capital stock in property at a fictitious value.

Being clothed with a certificate of recommendation from the State, they are then in a position to enable them to defraud the unwary.

It is useless to say that it is not the business of the State to act as the guardian of the ignorant or the credulous. That is one of its functions, and it is a fact that many have implicit confidence in the Government. They think that whatever the Government has authorized may be assumed to possess some elements, at least, of safety which do not ordinarily attach to the undertakings of individuals.

And is it well to dispel this illusion? Would it not be better to see that something is known about the doings and the intentions of those who apply for a letter of introduction before they are furnished with a certificate of good character?

And after all, is not the State a party to the deceptions and frauds which have been perpetrated through the instrumentality of the creatures for the existence of which she is accountable?

Is there one of us who would dare to assume her legal, much less her moral, responsibility for the continued existence of these creatures?

And would the State not be pecuniarily, as she is morally, responsible for them, if she was not exempt from suit?

The extent to which corporations chartered under our laws have been used as a means for defrauding is no less astonishing than mortifying. I have in mind one case where a charter was obtained for a corporation with an authorized capital stock of three million dollars. Large quantities of the stock which had been issued to the

promoters of the concern were sold principally to persons living in the Northern and Eastern States who were deceived by advertisements and by representations to the effect that the company owned valuable and extensive properties in Texas which had been developed to a wonderful degree.

It having been ascertained that these claims were untrue, and a suit having resulted in the forfeiture of the charter of the corporation, great numbers of letters have been received which showed that thousands of dollars had been paid for the worthless stock of the concern.

This is not an exceptional case or it would not have been mentioned.

We can not assume that unscrupulous persons will not do what others have done. In fact, those who are looking for methods by which they can defraud have only comparatively recently learned of the unrivaled facilities afforded by our corporation laws.

Some time ago a gentleman related to me this occurrence: A man from a distant State, who had procured a charter for a mutual insurance company, remarked: "This is the greatest graft I ever struck. I will insure houses and other things that regular insurance companies will not take a risk on, and will be able to collect several hundred thousand dollars before judgments can be obtained on account of the loss of any property insured."

"But what will you do when they do get judgments?" he was asked.

The enterprising individual replied: "They can take the corporation and do what they please with it; I will be gone."

Suit was brought and the charter of the concern referred to was forfeited. Although it had done a large business, the State had to pay the cost of the suit, as no assets of the corporation could be found out of which it could be collected.

Suits have also been brought which have already resulted in the forfeiture of the charter of eleven others of these corporations, and still other suits are pending in which like results will be reached if the necessary service can be obtained.

The State has had to pay the cost in all of the cases which have been disposed of.

The last Legislature, to its credit be it said, passed a law under which safeguards which it is to be hoped will be effective were thrown around the organization and operation of corporations of the character of those referred to.

Before any corporation should be allowed to begin business, it should be required to make the same kind of a showing that is now

required of an insurance company. It should be required to show that the capital stock of the company, to the amount required by law, has been paid in and is possessed by it in money or in such property as the corporation may be authorized to receive and as may be necessary for the carrying out of the purposes for which it was created. The officers of the corporation should be required to certify under oath that the capital stock, in money, or in the property of the kind just mentioned, has been paid or transferred to and is the property of the corporation, and that the property is of the full value at which it was taken.

These requirements should be made, first, because they are right, and second, because they are in compliance with the Constitution of our State which provides that "no corporation shall issue stock or bonds except for money paid, labor done or property actually received," and third, because the experience of other States shows that requirements similar to those suggested are necessary for the protection of the bona fide investors in the corporation as well as the public.

The laws of Massachusetts provide that no corporation shall commence the transaction of the business for which it is organized until the whole amount of its capital stock has been paid in, and a certificate of that fact and of the manner in which the same has been paid in has been filed in the office of the Secretary of the Commonwealth.

Similar provisions are contained in the laws of other States, and in our laws so far as insurance companies are concerned.

Is there any reason why a different rule should prevail as to those who may wish to organize an insurance company from that which applies to those who wish to form a corporation for the purpose of engaging in some other business?

The requirements recommended will only embarrass those who desire to form a corporation for the purpose of making money out of its organization instead of its operation.

It would be useless to amend our laws so as to prevent the improper formation of corporations unless the manner in which they shall conduct their affairs is provided for.

The changes I would suggest in this line are simply that we will apply to ordinary corporations the same rules which now prevail in this State as to insurance companies and in many States as to all corporations.

We should prohibit the officers of a corporation from declaring a dividend except from the surplus profits arising from the business of the corporation. This is the law now as to insurance companies.

Article 3087 of the Revised Statutes reads: "It shall not be lawful for any insurance company organized under the laws of this State to make any dividends except from the surplus profits arising from its business."

The laws of New York prohibit the declaring of dividends "except from the surplus profits arising from the business of the corporation," and, as stated, similar provisions are found in the laws of many other States and of other countries.

And I again ask, why should not this be the law? If a corporation is organized for a legitimate purpose, that is, for the purpose of engaging in business and not for mere speculation, why should not all restrictions be thrown around its operation which experience has demonstrated to be necessary for the "protection of the public and of the individual stockholders."

Nearly all other civilized countries have found it necessary to embody in their laws the prohibition which has just been suggested. Why should not we do likewise? Is it possible that we are willing to continue to furnish a field for the exploitations of adventurers? And does the fact that many corporations have been properly organized and wisely conducted in our State furnish any reason why opportunities which have been taken advantage of in some instances by sharpers should be left open to them? Would not it be to the advantage of every corporation that is to be honestly conducted and used for proper purposes in this State if it could be known that the laws of Texas afforded reasonable guarantees that corporations must be properly organized and operated?

But some may ask, can not the charter of corporations which have been improperly obtained or which have been made use of for fraudulent purposes be recalled by a suit in the name of the State? Undoubtedly this can be done, but such a remedy by no means affords protection either to the public or the stockholders. The charter of a corporation can only be forfeited when proof of the facts which justify that course can be obtained, and the existence of these facts can not generally be discovered until the injury has resulted.

Of course, all regulations and restrictions upon domestic corporations should be extended to foreign corporations which engage in business in this State. That is, before a permit is granted authorizing a foreign corporation to transact business in Texas, it should be required to make the same showing as to its capital stock having been paid in, etc., as a corporation would have to make if chartered under our laws, and the same rules with reference to the conduct of the business of a corporation organized in Texas should be observed by foreign corporations operating here under the pen-

alty of forfeiting the right to continue such business in the State.

Our laws should be so amended as to clearly provide that no foreign corporation should be granted a permit for the transaction of any business in Texas for which a corporation can not be organized under the laws of our State.

I hope this is now the law, but amendments should be adopted which would remove all possibility of any question of this character.

I trust that I have said nothing that can be construed as indicating an opposition to corporations. I believe that corporations, properly controlled, are of great benefit to the public, but that when not properly controlled they are a continual source of injury. I do not favor radical legislation which might result in crippling any of our legitimate industries, but I do insist that the recognition of the duty imposed in express terms by our Constitution, as well as by a proper regard for the honor and welfare of our State, shall not be postponed, and that we should follow in the footsteps of others and throw around the creatures of law every safeguard that experience has demonstrated to be beneficial.

RECENT NOTEWORTHY DECISIONS.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. EDWARD F. HARRIS,

OF GALVESTON.

Mr. President and Gentlemen of the Texas Bar Association:

From 1896 to 1901 inclusive the Association had an annual review of recent noteworthy decisions in civil cases. For a reason unknown to me, this feature was omitted in 1902 and 1903. I have taken up the work where the last paper dropped it. Inevitably I will omit many decisions which might well be reviewed; nor can I do more than briefly state the substance of the decisions reviewed without any detailed statement of the facts of each case. The patience of an auditor must not be too sorely tried, and yet I am convinced that there is no work of greater importance to us than a presentation of the work of our appellate courts in applying old principles to new facts.

LANDLORD AND TENANT—EXECUTION.

In Copeland vs. Cooper Grocery Co., 63 S. W. Rep., 886, opinion by Key, Justice, it is held that a landlord's written waiver of the conditions of a lease and of the statute which prohibits subletting without his consent, delivered to the tenant's creditor before the issuance of the attachment, subjected the leasehold to the attachment for the tenant's debts to such creditor. This case seems a natural sequence of Moser vs. Tucker, 26 S. W. Rep., 1644, in which case substantially the same doctrine was held. The Cooper Grocery Company were ingenious in their application of the Moser

case. The only feature perhaps which appears striking in the Copeland case is that the tenant did not know of the waiver by the landlord in favor of the creditor until after the levy; but the decisions were solely and properly based on the landlord's, not the tenant's, right of protection, and in this light all strangeness disappears.

APPEAL, COSTS, BONDS.

In Pendley vs. Berry, 65 S. W. Rep., 32, Williams, Justice, it is held that an appellant who was able to pay part of the costs of appeal but unable to secure the full amount must pay such part in order to appeal.

In Railway Company vs. Neal, 63 S. W. Rep., 49, Bookhout, Justice, it is held that where the obligee in the appeal bond is a stranger to the record the bond is void. It can not be cured though the statute provides for such action where the bond is defective either in substance or form. This decision seems to me to "stick in the bark." Since writing the above I have found the later case of Williams vs. Wiley, 71 S. W. Rep., 12, in which the Supreme Court practically does away, I think, with the Neal case as authority, and in concluding the opinion Justice Williams says: "It may indeed be seriously doubted whether or not with such a statute in force it should longer be held that the jurisdiction of an appellate court at all depends on the giving of a bond."

As a result of many conflicting cases, the Dallas Court of Civil Appeals certified questions, and in answering them in Slayton vs. Horsey, 78 S. W. Rep., 919, the Supreme Court holds that one of several defendants not adversely interested may appeal without making his codefendants in judgment obligees in the bond.

WRIT OF ERROR—WHEN NOT ALLOWED.

In Railway Company vs. Coolidge, 65 S. W. Rep., 181, Brown, Justice, the Supreme Court holds that a party securing a reversal in the Court of Civil Appeals could not obtain a review of such decision on writ of error.

POWER OF SALE—WHEN CORRECTED—NOTICE TO DEBTOR.

In Kerr vs. Galloway, 64 S. W. Rep., 858, Gaines, Chief Justice, it is held that the power of sale in a trust deed is not ineffectual because the wrong county is designated for the sale, but that Article 2369, Revised Statutes, should be read into the deed, and will control.

In Fischer vs. Simon, 66 S. W. Rep., 447, the Supreme Court holds that no service of notice to the debtor is necessary when sale is to be made under the power contained in a deed of trust. The decision is based on the word "now" in Article 2369, Revised Statutes.

COMMUNITY PROPERTY.

In Kellett vs. Trice, 66 S. W. Rep., 51, Williams, Justice, it is decided that a husband and wife can not by agreement convert her separate property into community property. This is due to our statute. Strange as it may seem, the wife can do a larger thing and by conveyance change her separate property into her husband's separate property. Riley vs. Wilson, 24 S. W. Rep., 394.

MANDAMUS OF STATE OFFICERS.

In Lewright vs. Love, 65 S. W. Rep., 1089, Gaines, Chief Justice, the court refused to mandamus the State Comptroller to compel him to sue the International & Great Northern Railroad to recover taxes alleged to be due the State. The court holds that Lewright vs. Bell, 63 S. W. Rep., 625, is conclusive, and again differentiates Kimberly vs. Morris, 87 Texas, 537. Where the public duty is owed only to the government as such private persons may not move for the writ of mandamus against the public official. The court recognizes that there is a conflict in decisions of the various courts of the Union.

In Ramsey vs. Tod, 69 S. W. Rep., 133, Gaines, Chief Justice, it is settled that a Texas corporation can not be formed for two or more purposes, as designated in the different subdivisions of Article 642, Revised Statutes, and the court refused the writ of mandamus to compel the Secretary of State to file such a charter.

INJURIES NOT RESULTING IN DEATH; SURVIVAL OF ACTION; ASSIGNMENT OF CAUSE OF ACTION.

In Railway vs. Moore, 68 S. W. Rep., 558, Templeton, Justice, the court decides that the survival of a cause of action for personal injuries not resulting in death does not depend on the bringing of suit thereon by the injured person in his lifetime. Writ of error was denied by the Supreme Court. If the suit had been filed and thereafter plaintiff had died from such injuries, then in Ellyson vs. Railway, 75 S. W. Rep., 868, Fisher, Chief Justice, says the suit would have abated and the cause of action would be found under the statute, Article 3017, etc. The Moore case is cited

with approval in Railway vs. Ginther, 72 S. W. Rep., 166, opinion by Justice Williams. The Ginther case also approves Railway vs. Andrews, 67 S. W. Rep., 923, holding that an assignment of part of a cause of action to plaintiff's attorney before suit was brought was valid.

ACT OF GOD; PROXIMATE CAUSE; SURVIVORSHIP.

Railway vs. Bergman, 64 S. W. Rep., 999, Gill, Justice; Railway vs. Seley, 72 S. W. Rep., 89, Key, Justice, and Hunt vs. Railway, 74 S. W. Rep., 69, Speer, Justice, are a group of cases growing out of the great storm of Galveston in 1900. These cases follow the generally accepted doctrine that the act of God is the proximate cause and the prior negligence, if any, of the carrier is the remote cause of the loss; hence the carrier is not liable. Another case growing out of the storm is Bartlett vs. Bisbey, 66 S. W. Rep., 70. A house in course of erection was destroyed. It was held that the loss fell on the building contractors, who had not protected themselves by their written contract against the "act of God."

The case of Hildebrandt vs. Ames, 66 S. W. Rep., 128, Pleasants, Justice, is one of first impression in this State. A life insurance policy was payable to assured's wife, if living; both died in the Galveston storm; the evidence did not show which perished first; the court held that those claiming through the wife had the burden of showing that the beneficiary was living at the death of the assured. Writ of error was refused by the Supreme Court.

CONVEYANCE; JOINDER OF MINOR HUSBAND.

A minor husband joined his wife in a conveyance of her separate real estate. Held good, notwithstanding his minority, in Tippett vs. Brooks, 67 S. W. Rep., 512 and 495, opinions by Justices Rainey and Williams.

JURISDICTION OF DISTRICT AND APPELLATE COURTS.

The Supreme Court in Ablowich vs. The Bank, 67 S. W. Rep., 881, overruled all former decisions and held that where a suit was brought in the district court in good faith to enforce a lien on land the fact that upon trial it developed that there was no lien did not toll the jurisdiction of the court. I can not refrain from congratulating Justice Brown upon the fact that when he means overruled he says overruled, and does not say modified, distinguished, or the like.

Answering certified questions, in 67 S. W. Rep., 888, Railway vs. Cunnigan, the Supreme Court, Gaines, Chief Justice, holds

that when plaintiff sued in a justice court for $200 and on appeal to the county court recovered $50, an appeal lies to the Court of Civil Appeals; and in 73 S. W. Rep., 947, Railway vs. Cooper, that such an appeal lies from the district court in a suit brought in a justice court for less than $100, when by statute the appeal from the justice was first to the district court.

FRANCHISE TAXES; CORPORATIONS.

In City of Dallas vs. Railway, 66 S. W. Rep., 835, reversing the San Antonio Court of Civil Appeals, the Supreme Court construes its former opinion in The State vs. Railway, 62 S. W. Rep., 1050, as holding that the franchise of a railroad company was not assessable as a separate distinct entity from the physical property. The court says it did not hold that the franchise was not assessable, nor that under the statutes then in question its value could not be estimated in determining the valuation of the company's property for purposes of taxation. The court proceeds to hold that under the Dallas city charter the separate assessment of the "franchise to operate and maintain lines of street railways" over certain streets was valid. A careful reading of the opinion in the case in 62 S. W. Rep. leads me to the conclusion that the Court of Civil Appeals should be excused for not understanding it in the sense that the Supreme Court later said was meant to be conveyed. See, also, Telegraph Company vs. Meerscheidt, 65 S. W. Rep., 381, Fly, Justice.

RAILROAD COMMISSION CASES.

In Railroad Commission vs. Weld & Neville, 73 S. W. Rep., 529, the Supreme Court sustains the constitutionality of Articles 4565 and 4566, Revised Statutes, which provide that the burden of proof is on the plaintiff, who attacks the rates of the Commission, to show by clear and satisfactory evidence that the rates are unreasonable and unjust to him. The court in an opinion by Justice Brown says that it has been unable to find any trace of any other statute like the one under discussion.

In Railway vs. Railroad Commission, 69 S. W. Rep., 62, the Supreme Court held that it had no revisory power over the action of the Railroad Commission in declining to take jurisdiction of an application for authority to issue stocks and bonds.

In Railway vs. Cotton Company, 69 S. W. Rep., 490, opinion by Pleasants, Justice, the court sustains the Railroad Commission in not making any distinction of rates between compressed and uncompressed cotton.

SALE FOR ILLEGAL PURPOSE.

In the city of Dallas a named named Ohlson made for a man named Wilson a trick faro box, which Justice Rainey explains as a "box, the mechanism of which enabled the user to manipulate the cards in favor of the exhibitor of the game and against those who bet at said game." Wilson did not pay Ohlson, and on suit the court decides that it can not help Ohlson. Ohlson vs. Wilson, 71 S. W. Rep., 768.

INSTRUCTIONS; DISJUNCTIVE DEFENSES.

Owing to conflicting decisions, the Supreme Court was called on to answer certified questions, and in Railway vs. Hill, 69 S. W. Rep., 136, hold that where no request was made to submit several matters of defense disjunctively their submission conjunctively is not reversible error, it not appearing that the jury was misled. As such a charge naturally inclines the jury to believe it necessary for the defense to establish all such defenses, I am unable to see how a jury can help being misled by such a charge.

HUSBAND'S LEASE OF WIFE'S SEPARATE LANDS—CONVEYANCE.

The gist of the decision in Dority vs. Dority, 71 S. W. Rep., 950, is that a husband can not make a valid lease of the wife's separate real estate for more than one year, and in Nolan vs. Moore, 72 S. W. Rep., 583, the court sustains a deed to a married woman's separate realty made by her husband and another acting under a power of attorney from the wife alone.

TELEGRAPH RIGHT OF WAY OVER RAILROAD RIGHT OF WAY.

Answering certified questions, the Supreme Court in Railway vs. Telegraph Company, 71 S. W. Rep., 270, sustains the right of the telegraph company to condemn a right of way over and along a railroad right of way, notwithstanding its right of way over other property or in other ways.

CONTEMPT OF COURT.

In Kruegel vs. Nash, 70 S. W. Rep., 983, the court says that a district judge has not the power to debar a party from appearing at the bar of the court in his own behalf, and that a man surely is entitled to appear in court by motion and otherwise to purge him-

self of an alleged contempt. If it had not required an application to an appellate court to have these rights recognized, I should never have supposed there was any doubt about the matter. It shows simply how bad a judge a good judge may be when considering an alleged contempt of himself; in other words, when trying his own case.

INDUCING BREACH OF CONTRACT ACTIONABLE.

An interesting case of first impression in this State is Raymond vs. Yarrington, 73 S. W. Rep., 800, wherein after reviewing American and English decisions, Chief Justice Gaines, speaking for the Supreme Court, holds that for persons knowingly to induce one to break his contract with another gives the latter a cause of action against them for damages arising from the breach. Here good law seems to dwell with good morals.

ASSIGNMENT FOR BENEFIT OF CREDITORS—BANKRUPT ACT.

If, since the passage of the bankrupt act of 1898, a creditor accepts one-third of his claim from the proceeds of a general assignment under our State statute, has he discharged the debtor? In Hajek vs. Luck, 74 S. W. Rep., 305, the Supreme Court says he has.

PURCHASE OF DRAFTS AND BILLS OF LADING—BUYER'S LIABILITY.

Sellers of wheat, cotton and other products of the soil often draw on the buyers and take the drafts, with bills of lading attached, and sell them to the local banks. Does the banker stand in the shoes of the shipper, so that the former is liable for shortage in weights and grades? Is the banker bound to perform the shipper's contract? The Austin Court of Civil Appeals said that he was so bound in Landa vs. Lattin, 46 S. W. Rep., 48, and the Supreme Court of North Carolina followed the decision in Finch vs. Gregg, 49 L. R. A., 679. But the Galveston Court of Civil Appeals became doubtful and certified the question to the Supreme Court, and that body, speaking through Justice Williams, in Blaisdell vs. The Bank, 75 S. W. Rep., 292, overrules the Landa case, and the bankers now breathe easier.

RIGHT OF PEACEABLE RECAPTION.

A contract giving the right of peaceable recaption of personalty is valid, notwithstanding the decision in 73 Texas, 242, 11 S. W.

Rep., 272. See opinion by Chief Justice Gaines in 71 S. W. Rep., 275, Singer Company vs. Rios. In this case the sewing machine was rescued without strife and without brawling.

LANDLORD'S LIEN—DURATION.

In Allen vs. Brunner, 75 S. W. Rep., 821, Justice Streetman holds that Article 3251, Revised Statutes, prevents a landlord from ever asserting a lien for more than one year's rent due in advance, no matter how many years be covered by the rental contract. This case does not refer to a lien given in the contract of leasing.

BARRATRY STATUTE.

The Twenty-seventh Legislature made it a misdemeanor for a lawyer to "promise to give, loan, or otherwise grant money, or other valuable thing, to the person from whom such employment is sought before such employment in order to induce such employment." The Fort Worth Court of Civil Appeals held that a contract by which the lawyers agreed that the client should be at no expense in the matter of his claim was obnoxious to said Act of 1901 (p. 125). See Railway vs. Carlock, opinion by Justice Stephens, 75 S. W. Rep., 931.

BREACH OF CONTRACT—MEDICAL ATTENTION TO SERVANT.

A railroad employing a section foreman contracted with him to deduct 50 cents a month from his wages for its hospital fund. That employe was entitled, under certain rules, to the benefits of medical attention. He was refused such treatment after his discharge from the service of the company. He sued, alleging negligence in failing to furnish him such medical attention and treatment. The San Antonio Court of Civil Appeals held that the plaintiff had wholly mistaken the character of his cause of action, which was really ex contractu, not ex delicto. See Railway vs. Hennigan, 76 S. W. Rep., 452, Neill, Justice.

ACCIDENT INSURANCE.

I am aware that this paper changes topics almost as frequently as, and much less methodically than, the dictionary. We now pass from hospitals to eating oysters—apparently a happy transition. But in the case I am to tell you of now, eating spoiled oysters caused the death of William T. Hudgins, Esq., of the Texarkana

bar. He was insured "against bodily injuries sustained through external, violent and accidental means," the policy, however, excepting therefrom "injuries fatal or otherwise resulting from poison or anything accidentally or otherwise taken, administered, absorbed or inhaled." The Dallas Court of Civil Appeals permitted recovery, but the Supreme Court reversed and rendered the case. Casualty Company vs. Hudgins, 76 S. W. Rep., 745. Brown, Justice.

EXAMINATION OF PERSON OF INJURED PLAINTIFF.

There have been many and diverse views concerning a question of great importance in suits for damages for personal injuries, and as such suits are a large percentage of the causes tried in our courts it is well to settle the question whether the trial judge has authority to compel the plaintiff to submit his person to an examination by physicians appointed by the court. In Railway vs. Cluck, 77 S. W. Rep., 403, the Supreme Court holds that the trial judge has no such authority, but that the refusal of plaintiff to submit to an examination by physicians is a fact proper for the jury as bearing on the credibility and sufficiency of the testimony upon which he seeks to recover.

CERTIFICATES OF DISSENT—WRIT OF ERROR.

In McCord vs. Nabours, 78 S. W. Rep., 223, the Supreme Court decides that while a certificate of dissent is pending before the Supreme Court it will not grant a writ of error though the parties ask it to disregard the certificate in case it grants the writ.

In Sorrells vs. Goldberg, 78 S. W. Rep., 711, the Dallas Court of Civil Appeals holds that the taking possession of premises and paying one or more installments of rent under a parol lease for a longer term than one year is such performance as will take the lease out of Article 2543, Revised Statutes, and make it enforcible according to its terms.

LOCAL SELF-GOVERNMENT—VALIDITY OF CITY CHARTER.

After the storm of September 8, 1900, the great mass of citizens of Galveston deemed it imperative that a new form of city government should be had. It was granted by the Twenty-seventh Legislature. Among other provisions the Governor was empowered to appoint three members of a board of five commissioners which constituted the governing body as successors of the mayor and alder-

men. Our Constitution declares, among other things, that the maintenance of our free institutions and the perpetuity of the Union depends on the preservation of the right of local government unimpaired to all of the States; also that all political power is inherent in the people and all free governments are founded on their authority and instituted for their benefit. The usual distribution of power to the legislative, executive and judicial departments is made. The charter was attacked as violative of these provisions. The Supreme Court in Brown vs. City of Galveston, 75 S. W. Rep., 488, sustains the charter, holding that no right of local self-government, based on history or tradition, exists in a city whereby the Legislature is precluded from making the members of the city's governing body gubernatorial appointees. The court courteously takes issue with the contrary view taken by the majority of the Court of Criminal Appeals in Ex Parte Lewis, 73 S. W. Rep., 811. These cases well illustrate the anomaly of having in Texas two courts of last resort of equal authority and dignity. The Supreme Court of Texas is supreme only in name as long as it has not revisory power over all other courts in the State.

The courts of Texas continue to maintain a uniformly high capacity and industry, and in conclusion I can not refrain from again urging the bar to act as a unit in attempting to secure for our district and appellate judges compensation commensurate not alone with the dignity and authority of their position, but also reasonably approximating the increased cost of living since the date of fixing their present meager salaries.

THE LEGAL MIND.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

A. E. WILKINSON, ESQ.,

OF AUSTIN.

When we were young and enduring—even relishing—lectures on legal ethics we used to hear much about our duties to the profession. Youth is apt to take itself seriously, and doubtless we all had our speculations as to what we were going to do to the law when we got hold of it, and doubtless we suggested to spectators something resembling the famous question, "What would that dog have done to the train if he had caught it?" A much more serious matter then, would have been the question, "What is the law going to do to you?" The young attorney may be certain that his profession will, before many years of following it, have marked him in various ways as one whose feet have trod

"The brawling courts
And dusty purlieus of the law."

So, by the legal mind, is here meant, not the native bias and characteristics which fit one for success at the bar, but rather those which result from following it. Much of interest, indeed, might lie in the path of the former inquiry. The eminent Mr. Jaggers, it will be remembered, picked out of his flock of pupils the most sullen, dull and apparently unpromising specimen, "the spider," as the one who was to succeed to his own greatness as a criminal practitioner. And why one man succeeds and another fails at the law will probably always remain more or less a mystery. But that, as Mr. Kipling would say, is another story.

Every calling leaves its mark upon those who pursue it.

"Nature is subdued
To that it works in, like the dyer's hand."

People who practice the habit of close observation have commonly little difficulty in picking out, among a crowd of strangers, the followers of the various vocations. A hundred subtle signs in dress and carriage, demeanor and countenance, betray the occupation which we at first made ours and which has ended by making us its own and putting upon us the seal of our calling. And we may be sure that the mental personality, so much more flexible and impressible than that of the body and capable of so much more in the way of variety and development, will, to a still greater extent, bear the signature and tell the story of the influences which have shaped it. What, then, is the stamp, for good or evil, which the practice of law leaves upon the faculties of the practitioner?

One of the things we often hear said of us, and which probably always strikes us with some pleasant surprise, is that lawyers, as a class, are not narrow men; that they are broad-gauged, liberal and possessed of a certain freedom of thought not so generally characteristic of other professions. If this be true, there must be a cause for it in the nature of the training and the bias of mind imparted by the study or the administration of the law; and an attempt will be made to inquire in what this consists, assuming that the compliment is deserved.

It may sound like a paradox to assert that the habitual application of the rule of stare decisis in legal reasoning has contributed materially to this result; but that it has done so will appear when we consider the effect which the recognition of this principle has upon the habit of thought in the legal profession as compared with other callings which have to appeal to the reasoning faculty in man.

The law reasons only upon the bearing on conduct of the necessities and demands of organized political society. The question to which it addresses itself is never a theoretical, but always a practical, one. It asks, not what is abstractly right and reasonable, but what portion of abstract right and reason the State can afford to enforce or must feel itself bound to enforce under all the circumstances? It must thus consider a vast number of things besides abstract justice. It takes cognizance of National traits, habits and temper, of usage and custom, and of the common ethical standards of the community. And, most of all, it looks back upon a vast accumulation of precedent in which those habits, customs

and standards have found expression. It boldly recognizes the fact that its tests of conduct are largely conventional ones, and claims the right to adhere to them because they are conventional. A respect for precedent is ingrained with the very fiber of the lawyer's mind; and this is his frankly maintained attitude towards new thought when it seeks to find legal expression.

Now it is just because of this avowed respect for precedent and accepted views, because the lawyer regards theory or speculation as something which is not to affect the standards of his profession until it has first secured popular acceptance and become a part of the popular conscience and scheme of life, that he is able to listen to it with perfect tolerance. His attitude towards all theories is a broadly liberal one, because they do not affect him practically and professionally by securing acceptance with him. He is free to give rein to his intellectual faculties, to accept or reject new thought, because, though it conquers his assent, it must first conquer that of the world before he considers that it ought to be reflected in the law of the land.

Thus the speculative opinions of the lawyer have little effect upon his views of legislation or of the proper administration of the law. He may be a pronounced infidel in religion, and yet a consistent advocate of the enactment and enforcement of Sunday laws. He may be, in theory, an advanced socialist, and yet, in practice, and with good conscience, a staunch supporter of vested rights. He knows better than most men the impossibility of embodying in legislation and enforcing through governmental machinery ideas which have not yet secured popular support. His business is to deal with accepted, not with speculative, views. Consequently he claims and exercises, in matters of speculative thought, a wide degree of freedom; while professionally he invokes, not abstract reason, but that peculiar intellectual process known as "legal reason," very happily set forth by Mr. Bishop in his "First Book of the Law."

Now most of those who are concerned in exercising their minds about man and his problems are not engaged in appealing, as does the law, to physical sanctions. It is their task to affect human action solely by affecting human convictions and sentiment. They appeal only to moral sanctions; and they can secure their aims only by insistance upon the absolute truth and necessity of the things they teach. Authors, philosophers, journalists, politicians, the clergy most of all, stand more or less in the same situation in this respect. They must represent their truth as absolute, their conclusions as certain. And because they must insist on their

absolute truth, they are necessarily intolerant of any one who disputes them. With absolute or abstract truth or reason, the lawyer, as a lawyer, has nothing to do and hence is broadly tolerant in regard to it. However radical he may be in his theories, he is generally a conservative in action. The reverence for precedent, to which he most properly bows in his daily task of determining what the law is, he is exceedingly apt to carry over into his determination of what the law should be. Doubtless precedent has an important place in the field of legislation also; but it is there not authoritative.

Here we find the basis for another view of the legal mind quite as current as that which approves its liberality—a view which insists that the ultra conservatism of the lawyer is an obstacle to progress. The publicist with a project for great social reform seething in his brain, the theorist with a wild scheme for turning things upside down possessing what he is pleased to call his mind, the thoughtful reformer with a philosophical system, the crank with an obsession, equally find themselves doomed to beat in vain against the immovable wall of legal conservatism. The members of the bar who have led or promoted legal and governmental reforms have rarely been practicing lawyers. The great men of the profession have usually been most cautious innovators or sturdy defenders of the existing status, even in its abuses. No one else is likely to appreciate so fully as do they what it has cost the world to get embodied in constitution and law the thousand guaranties of individual freedom of action which stretch around it today the lines of that mighty fortress of enactment and precedent by which it is guarded.

Let me illustrate this by reference to a mooted question. We have heard much discussion, in recent years, of what is called "compulsory arbitration." Undoubtedly the problems arising from the relations of labor and capital are ominous and threatening enough to make us welcome a scheme which promises a solution of them. Still, I take it that the opinion of the vast majority of lawyers is firmly opposed to the proposed measure. But why? No class can be more keenly alive to the difficulties of the situation or the frequent helplessness of law and government in dealing with it. Here is the lawyer's point of view. If a board of arbitration is to deal with these matters according to law, then the board is unnecessary. We have already a complicated system for enforcing the law through the machinery of existing courts—a system confided to the hands of trained experts and far more efficient and satisfactory, for the mere enforcement of law and legal rights,

as every lawyer's experience will tell him, than any arbitration could be. At least, if the lawyer's experience does not tell him this, it is because the much-vaunted system of arbitration has, in practice, fallen into such contempt and disuse, as compared with settlement through the courts, that many practitioners have had no experience with it.

It then becomes evident at once that what the advocates of "compulsory arbitration" of labor troubles really want, if they know what they want, is not the enforcement of law by arbitration, but the creation of a tribunal which shall be empowered to enforce what it happens to think right and just without reference to law —a board, in the language of Chief Justice Fuller, with general authority to "make men be good."

Now to the layman this sounds plausible enough; he can not conceive the shock that it inflicts on the mind of a lawyer, who knows the history of freedom and the torrents of blood through which humanity has waded that it might climb out at last upon the solid rock of "liberty protected by law." The history of the growth of freedom has been that of a struggle of the human creature for the right to be exempt from arbitrary power, the right that no one should judge him except in accordance with the law of the land—law enacted, published and settled before he can be called to account under it.

"Convert liberty into rights," says Guisot in his "History of Representative Government"; "surround rights by guaranties, entrust the keeping of those guaranties to forces capable of maintaining them; such are the successive steps in the progress towards a free government." That seems to me about the way the question strikes the lawyer. But do you think it can look just that way to any one but a lawyer? Do you think any one but a lawyer can quite see, as you do, that the erection of a tribunal empowered to "make men be good" is in its nature an abandonment of all law and of every hard-won constitutional guaranty, a reaction and a surrender, a giving up of the reign of law to return to the reign of caprice?

But we have not touched the bottom in this matter of difference between the science of law and other deductive sciences simply by determining that, in fact, the law is a system of reasoning based far more upon precedent than upon principle. We should be able to answer why, in the nature of things, it is so. For this is the reproach with which the layman is continually belaboring us. You say that the law is based on right and justice, the perfection of human reason. Is this provision or that one justified on principle?

Is it right? If not, it should not be the law, though a hundred judges have said that it should be so.

Now organized society is a far older creation than systematic law. Government, in the beginning, stood, probably for mere arbitrary power; since necessity taught men that it was better to live under despotism than in chaos. Law as a science was born into a world where certain fundamental conceptions of rights and wrongs were already settled, and settled rather out of necessity and instinct than upon pure reason. It began its career with data already furnished it, which it had neither inclination nor power to question; that the earth and its fruits should be the subject of private dominion, that they should be alienable and inheritable, that there should be freedom of private contract and that the State should protect the private proprietor in these supposed rights, are propositions which lie at the basis of its reasoning. But these, and all the fundamental propositions of law, were never settled on principle; they are all questionable on principle; they are today boldly questioned by many. Socialism, a philosophic socialism fascinating to many minds, declares that they are radically wrong. And in abstract reason and justice it may be so.

With these questions the science of law has nothing to do, and has never seriously concerned itself. It was never a speculative, but always a purely practical, science, which took hold of conditions existing in organized society as it found them and set itself to devising means by which those conditions should be made endurable.

Upon the premises furnished it by society it has pushed out in every direction the lines of an elaborate system of reasoning—a system, in the main, as logical and acute as the human mind is capable of developing. But a conclusion once established, recognized and acted on becomes in its turn one of the data on which its reasoning is to be exercised; why should the law dream of questioning this upon principle any more than of questioning the fundamental conceptions which society furnished it to start with, and which it has always known to be as freely mooted in philosophical discussion as they are closed against controversy as matters of law. To a mind which approaches legal reasoning with the conception that law is pure reason, and in ignorance of the things which the law regards as settled and thenceforth furnishing only the premises for reasoning, the vagaries of the logic of the courts must ever remain astounding.

To such we commend the words of wisdom recently quoted by our own Supreme Court from one of the last opinions delivered by Justice Holmes while on the Massachusetts bench. (Stack vs.

New York, etc., Railway Company, 177 Mass., 158, quoted in Cluck vs. Railway Company, 97 Texas, 183.)

"We do not forget the continuous process of developing the law that goes on through the courts in the form of deduction, or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon a deeper insight into the present wants of society. But the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change but to work out the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds, with such consistence as he may be able to attain."

That the practice of law is an avocation unsurpassed in the training which develops the faculties for practical usefulness has long been conceded. Why it is so may repay a brief inquiry. It is not because of the nature of the study of law involved, for the law, dependent upon authority to an extent with which hardly any other branch of learning can be reproached, is, as a subject of study, narrowing in its tendencies and far from encouraging to original thought. The average modern lawbook deserves to be classed among the "dregs and rinsings of the human intellect."

But the practice is quite another story. It is not a thing of routine. The practitioner, with case after case, is plunged into the task of mastering, in the shortest possible time, the details of complicated transactions, wholly new to him, and involving frequently an understanding of the business, the methods and the principles of callings most alien to his own, and even the learning of branches of science to which he has been a stranger. Today he is busy with the rules and considerations which control the fixing of rates for railway transportation, tomorrow with the complicated accounts of a mercantile enterprise or the mysteries of a system of bookkeeping (a "pseudo science," Dr. Holmes would call it, apparently invented for the purpose of concealing the state of accounts from everybody but the man who keeps them—and frequently from him); next week, coached by a medical specialist, he may be making a study of an obscure case of nervous derangement, its diagnosis and prognosis; when next you see him he is deep in the study, at the same time, of the methods of experts on handwriting, of the details of the marketing of cattle at the great city yards and abbatoirs, or the intricacies of dealing on the board

of trade; then everything else may be dropped for a season that he may qualify himself for a struggle with specialists in the modern science of bacteriology. In short, there is no conceivable bit of information about any subject in the world, from philology to the microscope, which the practitioner may not sooner or later find to serve some useful purpose.

No calling, it would seem, is so ill-calculated to develop the philosopher, the man of profound learning or the man of original thought, and none, in proportion to its numbers and ability, has done so little to enlarge the boundaries of knowledge. Not from such training come those who have

> "Far within old Darkness' hostile lines
> Advanced and pitched the shining tents of Light."

Little that a lawyer learns in this way becomes a part of his permanent intellectual furniture. It is superficially crammed, for temporary purposes, and, for the most part, properly forgotten when those purposes have been served.

But this discipline tempers the mind to an intellectual flexibility which seems to be the lawyer's distinguishing characteristic. No one is trained to understand new and strange things so quickly, to state them so clearly, or to apply them so readily. Hence it comes that they often succeed in untried situations—as civil administrators, at the heads of great departments of government and in executive positions demanded by great commercial undertakings. Leaders in such achievements are constantly recruited from the ranks of practicing lawyers. The number of bankers, of corporate managers and of leading men in civil and business administration who have commenced their career as successful lawyers is marked; and the fact is apparently not at all due to the accumulation from the practice of law of the wealth which enables them to take standing in other lines of effort. Few men make fortunes by the practice. But for the capacity to quickly master novel conditions and complicated details, the intellectual suppleness which enables its possessor quickly to get hold of a new situation and prove practically equal to its demands, no discipline can be superior to that of the legal practitioner.

Moreover the trial of causes, civil or criminal, makes constant demands upon the advocate's faculty for tracing the labyrinths of human conduct and motive. Here, however, it is to be feared that the judgment of the literary world, the poet and the novelist, is against us, for the lawyer's point of view seems to them to vulgarize and reduce to commonplace the intricacies of character with

which they deal. Many citations from literature might give point to this reproach, and it probably has a basis of truth. We may be too prone to judge of such things as men who consider, not what is true, but what can be made to look probable to a jury. Still, though it surrender too much to the juryman's point of view, though a certain smirch of vulgarity is likely to deface its judgments and estimates, the practice of law is a great training in knowledge of human nature.

The gains of this professional discipline are not made without some losses. The lawyer is not given to enthusiasm. His merits and defects largely flow from the fact that his whole training tends to render him critical and unemotional. No class, probably, is so irresponsive to the influence of oratory. And this is inevitable. A man can not accustom himself to listen, day after day, to the arguments of others, dominated all the time by the consuming desire to find a satisfactory answer to them, to pick flaws in their logic, analyze plausible sounding propositions into their fundamental nonsense and puncture iridescent bubbles of sentiment with the pin points of sarcasm, without making this critical habit a part of his nature. We are probably the most unsympathetic listeners in the world. We do not respond to suggestion. There may be cases on record of a lawyer being put under the influence of hypnotism (I never heard of one), but, if so, they must be exceptional. However hard one might try to yield himself to the spell, he could hardly conquer the habit of the alert objective mind, or force it to abandon its fixed attitude of hostility to suggestion. As a rule he could not become a mind-reader, or a good subject for mind-reading, nor become conscious of the possession of such a thing as the subjective mind, if there is such a thing.

But however much we may discount the results of the advocate's discipline as lacking in a certain delicacy, there has never been any question as to its robustness. No other calling offers anything in this respect quite equal to the inestimable advantage which comes from the fact that one's intellectual efforts are continually put forth in the immediate presence of an alert, trained and critical adversary, paid to stand before you and confute you if possible. Upon this emery wheel of perpetual controversy the intellect is certain to take the keenest edge of which its native temper will admit.

This little thesis is not without its moral. The lawyer, as representative of his client, invokes only the rude and coarse ethical standard which the State recognizes as necessary—frankly claims

for him subjection to only such rules of action as the law imposes. It would be fatal to his own moral nature if he were led thereby to govern his personal conduct by the same considerations, and to the honor of the profession, it is rarely the case that he does so. His training leaves him in little danger of confusing the standards of the law with those of abstract ethics. But on this point he leaves the laity in a state of perpetual bewilderment, it being to them inconceivable that a man may rightfully aid his client to do or to escape the consequences of doing those things which he would scorn to do for himself.

Of course it is quite impossible for us to see ourselves as others see us. To conjecture what we would think of ourselves as lawyers if we were not lawyers is a sort of Hibernicism. "Jimmy," said one Irishman to another, "Ye're drunk." "Ah, Mike," said the other, "ye'd not dare say that to me if I was sober." "Jimmy, if you were sober ye'd know ye were drunk."

Against the more subtle dangers of his calling to the lawyer's intellectual and emotional nature, some of which we have already noted, it is well that he should be on his guard.

The eminent Judge Campbell of Michigan, whom the writer has heard pronounced the man of broadest culture in the faculty of the great university where he taught, used to advise the members of his law class not to become wholly absorbed in their professional careers. Each should choose for himself some department of learning remote from that of his calling and narrow enough in scope to permit its complete mastery, which might serve to counteract the effect of the concentration of the mind upon the one subject by which he gained his livelihood. His own specialty, I understood, was Eighteenth Century French literature.

To those who prefer a study related somehow to their life work it would seem that the problems of sociology offer suitable opportunity, and that in the study of the broader aspects of government they may liberalize their conception of government applied to the individual through the magistrate and ruler, and, perhaps, from their practical experience be able to make some contribution to knowledge. Here there may be found food for most earnest study.

"Down to no bower of roses led the path;
But through the streets of towns where chattering Cold
Hewed wood for fires whose glow was owned and fenced;
Where Nakedness wove garments of warm wool
Not for itself; or through the fields it led
Where Hunger reaped the unattainable grain,

Where Idleness enforced saw idle lands,
Leagues of unpeopled soil, the common earth,
Walled round with paper against God and man."

But man owes a certain duty to his own highest development, and there is force in the suggestion that he may best find this in remoter fields. Some little department of pure science, the intellectual refreshment of his leisure hours, might help to keep alive in him the devotion to abstract truth. Or, if his taste is more for the humanities, the bookshelf filled with the works of the great masters of fiction, who have searched the recesses of the heart with a delicate touch which shames the processes by which humanity is measured in the jury box, or, better still, the treasury of the mighty poets, who have struck chords that thrill with the deepest mysteries of life and eternity, may well be the solace and refreshment of a mind that seeks refuge from

"That hardening of the heart which brings
Irreverence for the dreams of youth."

AFFIDAVITS OF JURORS TO IMPEACH THEIR VERDICT.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

AMOS L. BEATY, ESQ.,

OF THE SHERMAN BAR.

Mr. President and Gentlemen of the Bar Association:

The experience of having a case decided by the toss of a coin, or upon supposed facts detailed in the jury room but not proven in court, or as the result of embracery or bribery, with no way to prove the fact and get a new trial, is calculated to draw forth a protest against something. Almost every practitioner at the bar must have encountered some one or more of these modes of decision and also the rule, now so firmly settled by the Supreme Court of Texas and supported by the numerical weight of authority elsewhere, to the effect that a juror may not impeach his verdict by testifying to the misconduct of himself or his fellows. Not that such practices are common, for, be it said to the credit of the jury system, they are not, but even seldom occurrences of the kind are enough to make the subject practical rather than theoretical and to afford justification for this paper, the object of which is to show the error of the rule.

To avoid misunderstanding it may be well for the writer at this juncture to better define his position. It is freely conceded that the testimony of a juror should not be received to show that he did not in fact agree to the verdict; that he misunderstood or ignored the testimony or the charge of the court; that he did not apprehend the effect of the verdict; that he acted from improper motives; or anything of that kind. These are matters that essentially inhere in the verdict. Such facts are intangible, locked as

they are in the breast of the juror, and it would be against the plainest principles of public policy to permit the practice. It would provoke the rebuke of common sense. But, on the other hand, when a tangible transaction, a distinct occurrence, has taken place in the jury room in violation of the rights of a litigant—if additional evidence has been heard, if the verdict is the result of determination by chance, or of undue influences brought to bear—then, from the very nature of the situation, no evidence is usually available except from the jurors themselves, and this on principle ought not to be excluded. Public policy makes no such demand. If dishonest jurymen can be convicted of felony, the same proof that puts them in stripes should suffice to restore that which has been wrongfully taken by their conduct.

So far as the procedure in this State in criminal cases is concerned, the subject is covered by a statute which it was long ago deemed wise to enact, providing for a new trial "where from the misconduct of the jury, the court is of the opinion that the defendant has not received a fair and impartial trial, and it shall be competent to prove such misconduct by the voluntary affidavit of a juror." Code Criminal Procedure, Arts. 817-818. The rule complained of relates therefore only to civil practice.

Campbell vs. Skidmore, 1 Texas, 475, decided in 1846, is the first case by our Supreme Court touching the question. There an affidavit was made by a juror at the next term of the court after the trial to the effect that he misunderstood the charge of the court. The affidavit was rejected and its rejection approved on appeal. That case is plainly in harmony with the present contention. So also are the subsequent cases of Kilgore vs. Jordan, 17 Texas, 346, and Johnson vs. State, 27 Texas, 758, which involved the same point. Likewise, Little vs. Birdwell, 21 Texas, 612, ruling that where the jury failed to take certain documentary evidence to their retirement they would not be heard to say that if they had taken it their verdict would have been different; Thomae vs. Zushlag, 25 Texas Supp., 225, where the effort was to show by the jurors that they disregarded the charge of the court; Bank vs. Bates, 72 Texas, 142, where it was held improper to receive affidavits of jurors to show their understanding of the facts and upon what ground the verdict was based; and Boetge vs. Landa, 22 Texas, 106, and Letcher vs. Morrison, 79 Texas, 242, in which it was decided that jurors would not be permitted to testify that the verdict was not unanimous, as it purported to be when rendered. Clearly in all these cases, so far as the reports

disclose, the things sought to be shown were of such nature as to come within the rule as it unquestionably should be.

Mason vs. Russell's Heirs, 1 Texas, 726, decided in 1847, involved, it seems, a different question. It was ruled that affidavits of jurors could not be received to show their own misconduct, the court suggesting that the affidavits should have been received and made a part of the records of the court, not as a basis for a new trial, but as the grounds of punishment for the affiants. The report of the case fails to disclose the nature of the misconduct.

Cannon vs. State, 3 Texas, 32, decided before the statute on criminal procedure was passed, holds that when the bailiff in charge has made affidavit tending to show misconduct, a separation, on the part of the jury in a murder case, affidavits may be received from the jurors explaining their conduct. Mr. Justice Wheeler observed that affidavits of jurors may be received in support of their verdict, though not to impeach it.

Handley vs. Leigh, 8 Texas, 129, is often cited on the point. The holding of the court was that even if the verdict was reached in the way indicated by the affidavits of jurors there offered; that is, by taking a quotient, there was no impropriety. It did not appear that the jurors agreed in advance to be bound by the result of the calculation. The court said, however, that to permit a juror to make affidavit of the impropriety of himself and his fellows can not be too much reprobated.

Ellis vs. Ponton, 32 Texas, 435, is a case in which it was held that if the conduct of the juror in question was as stated in the affidavit, still it afforded no sufficient ground for a new trial, and while the court went on to say that affidavits of jurors could not be received to impeach their verdict, the statement was like the expression in Handley vs. Leigh, in the nature of *obiter dictum*.

It will be seen that none of the cases that have been noticed, unless it was Mason vs. Russell's Heirs, really involved the proposition being urged, and from the report of that case it can not be said whether it did or not. There are a few decisions of the Courts of Civil Appeals, and they go no further. But there are two Supreme Court cases that do and thev will now be reviewed.

Railway vs. Gordon, 72 Texas, 52, is one. It involved the question of whether or not affidavits of jurors could be received to prove a quotient verdict with an agreement in advance to abide by the result of adding the amounts that the jurors individually favored awarding and dividing by twelve. It was held by the

Commission of Appeals and the Supreme Court that such affidavits could not be considered.

Railway vs. Ricketts, 70 S. W. Rep., 315, is the other case, and it goes further still. The suit was to recover damages for personal injuries sustained by a passenger on account of alleged failure of the railway company to light and warm its station. It was a disputed issue of fact whether the station was lighted and warm or was dark and cold. After the jury had retired, and while considering of their verdict, the foreman stated to the other members thereof that he was satisfied that the plaintiff and his wife had testified the truth about there being no fire or lights and that the defendant's witnesses who had testified to the contrary, had testified falsely, because he, the foreman, had lived at the place a number of years, had been at the station often in the night time, and that he had never found any light in the waiting room or any fire in the stove. A verdict was returned against the company and on motion for a new trial it offered to show this conduct by affidavits of jurors. The trial court excluded the affidavits and the Supreme Court in answer to certified questions approved the holding. Said the court after citing most of the cases that have been mentioned:

"The precise complaint here made of the conduct of the jurors was not involved in any of the cases cited, but it is evident from the language used in the opinions that this court has adopted the broad rule that jurors will not, in civil cases, be allowed to attack their verdict by setting up misconduct, irregularities, or improprieties of themselves and their fellows occurring in the privacy of their deliberations; and this seems to us to accord with the great weight of authority. There are some authorities which restrict the rule within narrower limits, but they are evidently not in harmony with the decisions in this State. A modified rule is prescribed by the Code of Criminal Procedure for criminal cases, but the Legislature has never seen fit to alter the rule enforced by this court in civil cases from the beginning. The proof offered was not admissible."

Following this high and binding authority, it is the duty of every trial judge to ignore affidavits of jurors when offered against their verdict in a civil cause, and it may now be taken as settled that in this State there are no exceptions to the rule. This is the only fair construction that can be placed on the last decision. And it may be conceded that all courts and text writers agree that the weight of authority, so far as number is concerned, is agreeable with the doctrine so announced. In view of this and the unmistakable drift of its own previous decisions, it is not surprising that the court reached the conclusion that it did. Nevertheless, it can be shown, it is thought, that the doctrine is built upon precedent more than upon reason, and that this is one of

the many instances where a principle, sound in measure, has been carried so far and adhered to so closely that legislative relief is necessary.

It is certainly true that evidence of this kind should be received with caution and that the judge should be well satisfied before acting upon it. Allowances should be made for human frailty, and it might often be expedient to hear from all the jurymen. But when it is clear that something wrong has occurred and the court has no doubt, should his hands be tied? It is against the ironclad rule that the writer protests.

The reasons that have been advanced from time to time in its favor are: (1) that to allow jurors to avoid their verdict by testifying to their own misconduct or that of their fellows would tend to defeat their own solemn acts under oath; (2) it would open a door to tamper with jurymen after they had given their verdict; and (3) it would be the means in the hands of a dissatisfied juror to destroy a verdict after he had once assented, all of which are undeniably sound when applied to cases where the effort is to show that the verdict was not veredictum—a case of inherent vices—but are utterly inapplicable when it is proposed to show some grievous error of procedure in the jury room. The three objections really blend into one, which is that the practice would tend to corrrupt the jury system and hence contravene public policy. Now which is the more calculated to foster corruption: giving jurors to understand that in whatever they do or say in the seclusion of the jury room they shall have immunity from exposure, or admonishing them that they must walk the bright, straight path of conscience or else be held up to public view by those whose rights they have despoiled? If the law now required the proceedings of a petit jury to be kept secret after their discharge, there might be some logic upon which the rule could rest, but the main purpose of privacy is that there may be no interruption or interference until the deliberations are ended. Thereafter that which occurred in the jury room becomes or may become, through the medium of the jurors, the common knowledge of the community, and yet the court must be deaf. The argument that it would afford inducements for jurors to be tampered with would apply with equal force to witnesses that might be practiced upon. And if it be held good in the case of jurors, the present rule would invite espionage and eavesdropping. The danger, however, must be more imaginary than real, for neither in our court of criminal jurisdiction, where the other rule prevails by legislative enactment, nor in those States where by statute or

decision it prevails in all cases do we hear complaint. No repeal of such a statute has ever been known.

It seems to have been the rule in England prior to the Revolution that such affidavits were admissible. But Lord Mansfield with some hesitation, in Vaise vs. Deleval, 1 T. R., 11, changed the practice, and our present state of authority in America is doubtless due to the influence of his example and his judicial personality, although his conclusion was reached and the rule there ultimately fixed about the time of the separation of the colonies from the mother country. In the case cited the fact sought to be shown was that the jurors tossed up and the plaintiff won. His Lordship said: "In every such case the court must derive their knowledge from some other source; such as from some person having seen the transaction through a window or by some such other means." If the courts of our country had paused to analyze this reasoning before following the decision, a different result might have obtained. For if a juror is to be discredited under such circumstances, what shall be said of him who looks through the window? To employ the language of the court in an Iowa case:

"While it is certainly illegal and reprehensible in a juror to resort to lot or the like to determine a verdict, which ought always to be the result of a deliberate judgment, yet such resort might not evince more turpitude, tending to the discredit of his statement, than would be evinced by a person not of the jury in the espionage indicated by Lord Mansfield, and necessary to gain a knowledge of the facts to enable him to make the affidavit. At all events, the superior opportunities of knowledge and less liability to mistake, which the juror has over the spy, would entitle his statement to the most credit. And if, as is universally conceded, it is the fact of improper practice which avoids the verdict, there is no reason why a court should close its ears to the evidence of it from one class of persons, while it will hear it from another class, which stands in no more enviable light and is certainly no more entitled to be credited."

The early decisions in Massachusetts and New York accorded with the English rule, as it existed before Lord Mansfield's day, but afterwards, plainly out of deference, they were in a measure overruled so as to conform the practice to Vaise vs. Deleval. The impetus thus given may account for our decisions in Texas. Indeed, in our early cases the very decisions that changed the rule were cited in the briefs and opinions, and were approved.

However, some of the American courts that have come to deal with the question, especially in later years, have paused at the distinction and refused to follow Lord Mansfield. Most conspicuous among these is the Supreme Court of the United States.

United States vs. Reid, 12 How., 361, was where a newspaper

containing a purported report of the evidence in the case on trial went to the jury room, and this was sought to be shown by the affidavits of jurors. While holding that there was nothing in the paper calculated to operate as ground for a new trial, the court refused to sanction unqualifiedly the rule that affidavits of jurors can not be received. The Chief Justice wrote:

"It would perhaps hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice."

Mattox vs. United States, 146 U. S., 140, was decided in 1892, and without dissent the judgment of the lower court was reversed because the latter had refused to consider affidavits made by jurors in support of a motion for a new trial showing that a prejudicial newspaper report of the trial was read and discussed in the jury room. The present Chief Justice, speaking for the court, said:

"Public policy forbids that a matter rseting in the personal consciousness of one juror should be received to overthrow the verdict, because, being personal, it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve; its tendency is to produce bad faith on the part of a minority; to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors; if one affirms misconduct, the remaining eleven can deny; one can not disturb the action of twelve; it is useless to tamper with one, for the eleven may be heard. * * * On a motion for a new trial on the ground of bias on the part of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. * * * We regard the rule thus laid down as conformable to right and reason and sustained by the weight of authority. These affidavits were within the rule, and being material, their exclusion constitutes reversible error."

Thus it will be seen that this great court in the close of the nineteenth century, unembarrassed by any previous decisions of its own and in the full light of all the wisdom of the past, unanimously adopted the rule contended for and which, it is submitted, should pervail in Texas. Mr. Freeman in an editorial note in the American Decisions speaking of this rule has said:

"It commends itself for the protection it affords litigants against a verdict obtained by unlawful means, and at the same time it enshrines the deliberations of juries in the jury room with that mantle of secrecy which the policy of the law has always designed to secure, in order that a verdict may be the united judgment of all sworn to try the cause. Much as we might be inclined, however, to adopt this as the better rule, were we per-

mitted to decide, we must yield our opinions to the great weight of modern authority, which is undoubtedly opposed to the admission of affidavits of jurors in any case to show such misconduct on their part as will vitiate their verdict."

This was written before the Mattox case was decided, and also before many other recent decisions. If the learned writer were to express himself now, it may be doubted whether he would feel such a decided conviction as to the weight of authority except possibly from a numerical standpoint. In addition to the Supreme Court of the United States, the courts of last resort in Iowa (Wright vs. Telegraph Company, 20 Iowa, 195; Griffin vs. Harriman, 74 Iowa, 436); Kansas (Perry vs. Bailey, 12 Kan., 539); Nebraska (Harris vs. State, 24 Neb., 803), and Tennessee (Crawford vs. State, 2 Yerger, 60), apply this rule, and the States of Arkansas, California, Idaho, Montana and South Dakota have statutes allowing affidavits of jurors in all cases to show verdicts determined by chance. The decisions referred to are replete with arguments that stand unanswerable in logic.

The courts that hold in favor of Lord Mansfield's rule do not seem to have noted the distinction. It may not have been pressed by counsel. At any rate, it is a fact that wherever a discussion of the point has been entered into, the result has been a recognition of the distinction, except when the courts were otherwise bound by their own prior decisions.

On such questions, as on all others, the final test is that of right and wrong. If cases have not arisen they will arise in which for our courts to go on will mean to "violate the plainest principles of justice."

The time of an extreme case will come, and it will take but one harsh and unpopular application of the existing rule to bring about a legislative change.

THE HARTER ACT.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. JOHN C. WALKER,

OF GALVESTON.

About the second year of the reign of "Good Queen Ann," viz., about 1703, a porter or drayman of London, while transporting certain hogsheads of brandy from one cellar to another, by his negligence allowed one of them to be staved, and its contents were spilt. The incident was a trivial one, but out of it grew one of the most noted leading cases of the English law, and for more than 200 years that case, Coggs v. Bernard, 2 Ld. Raymond, 909, has been a beacon light illumining the whole subject of bailments, wherever the common law of England has been the basic system of jurisprudence. Up to that time the decisions upon the subject had been uncertain and confused, scattered as they were through the old Reports, and delivered upon first impression; but the genius of Lord Holt, Chief Justice, elucidated the law of bailments in that single case, and his opinion embodied such condensed learning that to this day it constitutes a succinct treatise, recognized in every common law country, and unchanged except by statute. The great judges of those days had not learned the caution which now seems to steer judicial decision away from the rocks of *obiter dicta*, and although the single question of a carrier's liability was involved, the great English jurist classified bailments into six sorts, from *depositum* to *mandatum*, laying down the degrees of care required in, and the liability attendant upon, each kind.

I quote from the case: "As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage, for a reward to be paid

to the bailee, those cases are of two sorts: either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, etc., which case of a master of a ship was first adjudged 26 Car. 2, in the case of Mors v. Slue, Raym., 220, 1 Vent., 190, 238. The law charges this person thus entrusted to carry goods against all events but acts of God and of the enemies of the king."

Towards the close of the eighteenth century another English-speaking nation sprang into existence—a mighty one—composed of distinct sovereignties, each maintaining its own system of laws and each having, within certain limits, diverse interests and policies. Each State of the American Union recognized, adopted, and incorporated into its jurisprudence the rule laid down in Coggs v. Bernard, as applied to common carriers.

The rigid rule was from time to time relaxed in England by decisions permitting the carrier to limit his liability by special contract, and even to stipulate for exemption against the negligence or misconduct of his servants (Peck v. Railway, 110, H. L. Cases, 473-493, 32 L. J. Q. B.) "until the common law responsibility of carriers had been frittered away," as was said by Justice Brown of the United States Supreme Court in the case of The Delaware, 161 U. S., 472. By "The Railway and Canal Traffic Act" (17 and 18 Vict., Chap. 31, amended by Acts 36 and 37 Vict., Chap. 2), railways and canal companies were made liable for all loss of or injury to any animals, articles, goods, or things occasioned by the neglect or default of such company (the carrier) or its servants "notwithstanding any notice, condition, or declaration made or given by such company contrary thereto, in anywise limiting such liability," and declaring every such notice, condition, or declaration null and void, with the following proviso, however: that such companies should not be prevented "from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable." 1 Smith's Leading Cas., 386 N. This English statute probably did not apply to seagoing vessels, and we quote from the Supreme Court of the United States in Compania La Flecha v. Brauer, 168 U. S., 117: "By the modern decisions in England, on the other hand, made since it has become to us a foreign country, common carriers, except so far as controlled by the provisions of the Railway and Canal Traffic Act

of 1854, were permitted to exempt themselves by express contract from responsibility for losses occasioned by the negligence of their servants."

At an early date many of the American courts, both Federal and State, laid down the rule that, while common carriers could by special agreement stipulate for a less degree of responsibility than is imposed by the common law, such carriers by land or sea could not exempt themselves from the duties of ordinary bailees for hire nor from liability for the negligence, default, fraud, or misconduct of themselves or their agents.

Most of the American courts have uniformly upheld this doctrine and have restricted the limitations by special agreement to those deemed reasonable and not against public policy. Waters v. Insurance Co., 11 Pet., 213; New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How., 213; Railway v. Lockwood, 17 Wall., 357; Bank of Kentucky vs. Express Co., 93 U. S., 174; Liverpool Steam Co. vs. Insurance Co., 129 U. S., 397; and see many cases from State courts cited, 1 Smith's Leading Cas., 453, 454.

It is not the purpose of this paper to discuss the Texas decisions as to what liabilities common carriers may or may not stipulate against, or wherein any of them conflict, if at all, with the current of authority; but it is unquestionably the law of this State that they can not limit liability for loss resulting from their own or their servants' negligence. Railway v. Sherwood, 84 Texas, 132; Railway v. Stanley, 89 Texas, 46; Railway v. Hume, 87 Texas, 218; Railway v. Baird, 75 Texas, 264; Railway v. Harris, 67 Texas, 169.

It may be stated as a general proposition that in the United States up to 1893, carriers both on land and water were liable for the negligence of themselves and their servants, which liability attached when they acquired dominion over the goods, and continued during the whole existence of the contract of carriage. The conflict between the American and English rules as to the power to make valid stipulations exempting vessels from liability from negligence of their owners, agents, officers, and crews operated to the disadvantage of American commerce until the United States Congress, on February 13, 1893, passed what is known as "The Harter Act."

This statute prohibits certain limitations of liability by special contract, but at the same time creates a new rule which must be startling to those unfamiliar with that piece of Federal legislation, for it exempts the carrier by water from all liability for damage to or loss of cargo caused by the negligence, fault, or mismanagement

of his agents or servants during the voyage if he has exercised a specified degree of care before the voyage begins.

The text of the first three sections is as follows:

Section 1. Be it enacted, etc.: "That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, storage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

"Section 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligation of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver the same shall in anywise be lessened, weakened, or avoided.

"Section 3. That, if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damages or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent, or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

Section 1 plainly forbids any attempt to limit by special contract the ship owner's duty to properly load, stow, care for, and de-

liver the cargo. Section 2 forbids any attempt to limit the owner's duty to properly equip, man, provision, and outfit the vessel and to make her seaworthy. Section 3, however, makes a sweeping change in the liability of carriers by water, providing that, when a vessel's owner shall exercise due diligence to make her in all respects seaworthy and properly manned, equipped, and supplied, he shall not be liable for damage or loss resulting from faults or errors in navigation, or in the management of the vessel, thus going beyond the old English rule allowing the vessel to contract against liability for the negligence of her owner's servants and agents, and relieving the carrier of such liability by statute, *proprio vigore.*

In 1900 the Parliament of Great Britain, presumably from a desire to be partly in line with the United States, passed an amendment to the Merchant Shipping Act of 1894 (63 and 64 Vict., C. 32), by which it was enacted that: "The limitation of the liability of the owners of any ship set by section 503 of the Merchant Shipping Act of 1894 in respect of loss of or damage to vessels, goods, merchandise, or other things shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused to property or rights of any kind, whether on land or on water or whether fixed or movable, by reason of the improper navigation or management of the ship.

Meanwhile, the prohibitions contained in sections 1 and 2 of the Harter Act against exemptions in bills of lading from liability for such negligence as improper loading or stowage, fault in proper delivery, proper equipment, etc., not agreeing with the English rules permitting such limitations, the question necessarily arose as to whether *foreign vessels* were subject to this act, where damage to cargo resulted from the acts of negligence specified in sections 1 and 2, and forbidden to be exempted by "any clause, covenant, or agreement in any bill of lading or other shipping document," such exemptions having been inserted in the bill of lading issued by the foreign ship in a foreign country.

In the case of Knott & Botany Mills, 179 U. S., 69, the voyage was one of a foreign (British) vessel from a foreign port to a port in the United States. The bills of lading purported to exempt the vessel from liability for "negligence of master or mariners" and from "all damage arising from stowage, etc., * * * whether before or after or during the voyage"; and, further, that "the contract should be governed by the law of the flag of the ship carrying the goods." Damage was caused by bad stowage. The court held the respondent liable, and that the act applied to all vessels of whatever nationality on voyages between foreign and United

States ports; that section 1 nullified the exemptions in the bills of lading, and that the law of the ship's flag could not be invoked. See also the Sylvia, 171 U. S., 462; The E. A. Shores, Jr., 73 Fed. Rep., 342; The Piper Aden Goodall Co., 86 Fed. Rep., 670.

The English courts have substantially agreed with those of the United States in the interpretation of this act, The Ferro (1893), Prob., 38; the Glenochil (1896), Prob., 10, and, so well is its validity recognized from an international standpoint, that the charter parties of many foreign vessels, notably those of Great Britain, now contain a stipulation that they are made subject to its terms and provisions.

The language of sections 1 and 2 so explicitly prohibits all attempts to exempt from liability for the negligence therein specified, that decisions involving their construction alone are comparatively few. They have generally been construed incidentally upon the ship owner pleading statutory exceptions under section 3.

By far the greater number of cases have arisen under the following portion of section 3: "That, if the owner * * * *shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damages or loss resulting from faults or errors in navigation or in the management of the vessel.*"

What constitutes seaworthiness? In the late case of The Southwark, 191 U. S., 1, the Supreme Court of the United States says: "As seaworthiness depends, not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that a vessel must be able to transport the cargo which it is held out as fit to carry or it is not seaworthy in that respect." Then comes the next question in logical sequence: What constitutes "due diligence to make the vessel in all respects seaworthy," etc.? This "due diligence" is thus clearly defined by Chief Justice Fuller in Navigation Co. v. Manufacturing Co., 181 U. S., 218: "We do not think that a ship owner exercises due diligence within the meaning of the act by merely furnishing proper structure and equipment, for the diligence required is diligence to make the ship in all respects seaworthy, and that, in our judgment, means due diligence on the part of the owners' servants in the use of the equipment before the commencement of the voyage, and until it is actually commenced. * * * We repeat, that, even if the loss occur through fault or error in management, the exemption can not be availed of unless the vessel was seaworthy when she sailed, or due diligence

to make her so had been exercised, and it is for the owner to establish the existence of one or the other of these conditions."

The burden of proving the due diligence required is upon the vessel, and it has been held that, where damage was caused by the incompetency of the master, the mere want of knowledge by the owners that he was incompetent was not "due diligence" (The Cygnet, 126 Fed. Rep., 742), they being bound to know that he was competent.

The application of these rules to facts has been sometimes confusing, and the courts have had difficulty in deciding whether or not a certain state of facts brought the particular case within section 3 so as to relieve the ship owner; in other words, whether certain negligent acts constitute fault or error in the navigation or management of the vessel or not.

Let us illustrate by reference to a few of the adjudicated cases. In Calderon v. Steamship Co., 170 U. S., 272, goods were carried beyond their destination, and, before the ship returned, they were lost. The court held that this was not a fault of navigation, but a fault in *proper delivery,* and that, therefore, the vessel was liable. See also The Seaboard, 119 Fed. Rep., 375.

In the case of The Frey, 92 Fed. Rep., 667, glycerine was so loosely stowed that it injured the other cargo. The vessel was held liable on the ground of improper stowage before the voyage began.

In the case of The Kate, 91 Fed. Rep., 679, the crew, while loading in port, failed to put up certain stanchions, leaving one to sustain weight which should have been borne by several; goods were damaged by reason of the neglect, and the vessel was held liable, because the fault was not one of navigation but of stowage.

Again, in The Colina, 82 Fed. Rep., 665, where the vessel sank in a storm of not more than ordinary violence, and where the evidence showed improper loading, considering her peculiar model, her owners were held liable, the court stating: "It is to 'management' *on the voyage* that the third section of the Harter Act refers, as the context indicates, and not to acts like those in the present case, in preparation for the voyage *before it begins.*"

So, in The Whitlieburn, 89 Fed. Rep., 526, an insufficient amount of ballast was placed in her hold, and during heavy weather part of her cargo was jettisoned. Suit being brought, the owner pleaded exemption on the ground of faulty management of the vessel. She was held liable, the court saying: "Here the jettison was made necessary by the unseaworthy condition of the ship, consequent entirely upon the mode of loading, stowing, and

ballasting before she sailed. If this can be called 'management of the ship' at all, it is in a remote sense only, and not in the sense in which that phrase is used in the Harter Act."

The controlling facts in The Aggi, 46 C. C. A., 276; 107 Fed. Rep., 300, were that a cargo of sugar was damaged by seawater which entered around loosened bolts under the ship's figurehead. There was no evidence that the bolts had been inspected within two years, or that they had been injured upon the voyage, only that the vessel was in an apparently sound and seaworthy condition when she commenced the voyage. She was held liable.

In the case of The Niagara, 84 Fed. Rep., 902, Ct. Civ. App., a collision occurred in a fog, and it was proved that the vessel's foghorn was defective, thereby contributing to if not causing the collision and loss of the goods. It was not proven that the foghorn was in good order when she left port. It was unfit for use when needed. The court held that the failure to provide that necessary equipment at the commencement of the voyage rendered the vessel liable.

Where a water pipe in a compartment of the ship froze while she was in port and burst during the voyage, causing damage to the cargo, the court held that as to that compartment she was unseaworthy, and that there was lack of suitable care in loading; consequently the exemptions of the Harter Act did not absolve the ship from responsibility. The Catania, 107 Fed. Rep., 152.

In the case of The Manitou, 116 Fed. Rep., 60, cargo was damaged by escaping steam during the voyage. There had been no sufficient inspection, and there was no evidence of the steam valves having been closed before leaving port. Held that the damage was not due to fault in management of the vessel, and that due diligence had not been exercised, consequently decree was rendered for the libelants.

Having reviewed some of the acts of negligence held to bind the ship, let us see what negligent acts have been held to be *"faults or errors in navigation or in the management of the vessel,"* thereby relieving her and her owners from all liability, notwithstanding confessed fault or negligence of the vessel's officers or crew.

In The Sylvia, 171, U. S., 462, the portholes were fitted with glass covers and iron shutters, and, while in port before sailing, the glass covers only were shut, the iron ones being left open for the purpose of lighting the compartment. No cargo was stowed against the ports, in order that they might be speedily closed in case of necessity. After sailing, the weather became rough. The

crew neglected to close the iron shutters; one of the glass covers was broken, and water came in, damaging the cargo. The United States Supreme Court decided that the fault or error was one of navigation or management of the ship, and that there was no liability.

In The Ontario, 106 Fed. Rep., 324, a water ballast tank, tight when the ship left port, sprang a leak during the voyage. The leak was known to the engineer and carpenter, who failed to report it, or to use the pumps sufficiently which would have prevented injury to the cargo. Held, that the negligence was in the *management of the ship*, and that the carrier was therefore exempted from liability by section 3 of the Harter Act.

In the case of American Sugar Ref. Co. v. Rickerson, 124 Fed. Rep., 188, cargo was damaged by seawater from a joint in a water ballast tank, which had been tested and found tight and in good order before the voyage began. The leakage was caused by leaving the sea valve open, which caused undue pressure on the joint. In holding that there was no liability, the damage having been caused by fault in the management of the ship, the United States Circuit Court of Appeals said: "We think the Albion (the carrier) was reasonably fit to carry the libelant's sugar, and that she would have carried it safely had not the *gross carelessness of her officers* permitted the influx of seawater."

Where a steamer contracting for the transportation of cargo loaded it on a barge which was lashed to the steamer, and the goods were lost by the barge striking an obstruction in the river, it was held that the steamer and owners were not liable, the loss resulting either from a danger of the river or from a fault or error in navigation or in the management of the vessel. The Nettie Quill, 124 Fed. Rep., 667.

In a case decided by Judge McPherson, of Pennsylvania, the injury to the cargo was caused by fresh water while the ship was lying at the wharf discharging her cargo at Philadelphia. The water had entered the vessel because a valve was improperly left open while water from the river was being pumped into the engine tank. The judge, denying liability, stated in his opinion * * * "it seems inevitable to conclude that the 'management' of a modern steamship must include the inspection, maintenance, and operation of the machinery by which she is moved and is enabled to carry out her contract concerning the safe carriage and delivery of the cargo; and that, where there has been fault in such inspection, maintenance, or operation, and the fault has caused injury to the cargo, the ship is relieved from liability by the express

provision of the statute if the prerequisite of seaworthiness has been duly made to appear." The Wildcraft, 124 Fed. Rep., 631.

Where a vessel had put into a foreign port for repairs, necessitated by a hurricane, and by an error of judgment the master did not have repairs made to the extent needed, the owners were held not liable for injury to the cargo which might have been prevented had more extensive repairs been made. The Guadalupe, 92 Fed. Rep., 670.

Failure to work the pumps by reason of which water accumulated in the bilges and caused damage to cargo was held to be a fault of the management of the vessel which exempted the ship from liability under the third section of the act, the vessel being seaworthy and well equipped. The Merida, 107 Fed. Rep., 146.

In a case heretofore cited on another point (The E. A. Shores, Jr., 73 Fed. Rep., 342), the vessel grounded upon a well-known reef, its position being designated by a flashlight clearly visible. She was shown to be entirely seaworthy. The court held that the stranding was due to a fault or error in navigation, and, therefore, the owners of the damaged cargo could not recover.

Injuries to passengers and claims for loss or damage to their baggage not shipped as merchandise and not paying freight are not within the Harter Act, consequently, the ship and owners can not claim exemption from liability for negligence in such cases. The act has reference to the transportation of merchandise only. The Rosedale, 88 Fed. Rep., 324; The Kensington, 88 Id., 331, 94 Fed. Rep., 885, 183 U. S., 265. Neither does it apply to the transportation of live animals. Sec. 7, Act February 13, 1893.

Sections 4 and 5 of the act relate to the obligation imposed upon the carrier to issue bills of lading (which was not required by any statute of the United States previously), Steamship Co. v. United States, 125 Fed. Rep., 320, and to the penalty prescribed for a refusal to issue such bills of lading.

A discussion of these as well as certain other features of the act is not within the scope of this paper, its purpose being only to emphasize the fact that one rule of liability for loss or damage to merchandise applies to carriers on land and a different one to carriers by water, and that under certain conditions the carrier by water is relieved of all responsibility for the negligence of his servants.

Does not this act afford food for thought respecting the future trend of national legislation? Rightful complaint is made of want of uniformity in the statutes of different States; for example, the conflicting divorce laws, with their far-reaching conse-

quences, and a cry is often heard for Federal control of that subject. It can not be denied that, generally speaking, uniformity *is* to be desired in all laws. Would not the great railroad systems, those stupendous combinations of capital reaching through every State of the Union, be benefited by similar legislation relieving them of liability for the negligence of their servants in any degree? May they not have the abstract right to be placed on the same footing with the great steamship corporations? Is not the argument more than plausible that special privileges should not be granted to one class of common carriers which are denied to others? And may not these railroad systems in time *demand* to be placed on an equality with carriers by water? Such demands when made by the representatives of powerful moneyed interests are likely to obtain at least a respectful hearing before the national lawmakers. When we recognize the power of the National Legislature to regulate interstate commerce, does not the thought suggest the possibility that at some time hereafter Congress, in its wisdom (or want of wisdom), may enact a law applying provisions like those contained in the third section of the Harter Act to interstate carriers on land?

GROWTH OF CENTRAL POWER IN THE UNITED STATES.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

W. M. COLDWELL,

OF THE EL PASO BAR.

Apology preludes failure more often than it follows, but the writer is compelled to begin with one. The subject of this paper is not technically professional. There has been no attempt to collect the different and often conflicting decisions upon some disputed question of the law, and to deduce therefrom a rule that will reconcile them with each other and with justice and expediency, the putative parents of the law whose legitimate children bear their pedigree in their features. My task is suggestive rather than didactic and by endeavoring to explain the causes which, during several generations have gradually moulded into its present shape the law of a most important and growing subject. I may be enabled to assist in forming some anticipation approximately correct, as to its development in the future.

That the Federal government is of vast and ever increasing importance not only in the cabinets of the nations, but in the domestic affairs and daily life of all within its jurisdiction, that, consciously or unconsciously, we are constantly directed or influenced by its direct or reflex action, are facts so manifest that inspection is equivalent to proof.

This result has not been obtained without opposition so gifted and so vehement that alike in the courts of justice, in the halls of legislation, and on the fields of battle, it has seemed to have gained all the honors except those of victory.

The Constitution as a whole is not self-enforcing, laws were necessary to give effect to its provisions and to extend the powers of the central government over the fields entrusted to its care. Of these laws nearly everyone that sought to place under Federal supervision subjects once controlled by the States, or as to which their powers were unexercised or non-existent, was opposed in the beginning as an unconstitutional usurpation, by a no small minority, and the opposition seems to have been invariably proportioned to the extent of the change destined to be effected. In the earlier days of the Republic the Constitution was on the lips of everyone. In the hearts of the people there was an unfeigned attachment for its provisions and confidence in its wisdom that was second only to their reverence for the Bible, and their belief in its literal inspiration. A general knowledge of the objects and the effect of that organic instrument seems to have been possessed by all classes of society and—prodigy unknown in this later age of eclipse of faith and cessation of miracle—whole classes of men opposed legislation, manifestly to their material interest, because it did not harmonize with their principles of constitutional construction. There was affection for the Union, but far more for the instrument by which it was effected. The Nation had not deposed the State in the hearts and eyes of men, and the preservation of the latter in all its pristine dignity was all but universally conceded to be a matter of at least equal importance with the formation and perpetuity of the former, and it is perhaps no exaggeration to say that in the eyes of many of our forefathers the Constitution was a holy thing too sacred for use in contact or connection with the sordid affairs of earthly government, and they were disposed to regard as sacreligious iconoclasts those carnal legislators who proposed to place in the hands of mere fleshly and Federal officials the mysterious powers enshrined within its text. To use more homely and, perhaps, accurate language, the powers vested in the central government were like the dollar placed in the hand of the boy as he was going to the fair, to be kept in his pocket and under no circumstances to be used.

"This all, all this was in the olden,
Golden time of Long Ago."

But the generations have effected and are now effecting their gradual but inevitable changes. The Constitution is rarely ever mentioned by the laity. They judge proposed legislation by its probable influence upon their interest, and not at all by its agreement therewith or by its effect upon the States as such. Its tradi-

tion has died out among the people, its cult is perishing and is confined mainly to one technical profession, largely supported by services at its altars. And even they regard it more and more as a mere law to be construed and applied as the exigencies of each particular case may require. The judges alone are now its priests, the courts its only temples, and even there we see unmistakable evidences that this is an age of rationalism, of higher criticism, if not of higher law. Though the Union and all it implies appeals as never before to the intelligence and to the hearts of all, the Constitution is more and more, in popular estimation, a mere garment valued for its service to the body which it enfolds and to be altered or even wholly changed as best suits the necessities of the wearer. Perhaps the patriot of the future will say that the ore has disintegrated, that the baser elements have been borne away by time and weather, leaving the gold behind, more visible and more valuable by reason of the separation.

I will now attempt to enumerate and to some extent describe the main causes of these changes, so portentous in the eyes of those geological survivals of the fauna of the age of strict construction who have escaped the cataclysm of Civil War, the glacial epoch of reconstruction, and the subsidence beneath the seas of circumstance of the islands that were once their habitat.

Causes which are secondary or which are generally recognized will be briefly mentioned, if at all, and only those will be dwelt upon which are of prevailing nature and which appear to have escaped observation by reason, doubtless of the subtility of their character. Nor will there be any attempt to appraise their relative importance. Some were more potent at one time and others at another, but altogether they constitute a united and indivisible whole and have made the environment which has conditioned and controlled the development of the new social and political organism which all alike will now dominate the Nation.

We do not impugn the wisdom of the fathers when we are compelled to recognize that their handiwork, however admirably adapted to the necessities of the time, was not in itself self-adjusting to all the exigencies of the future. Posterity is a word that often falls from the lips of the legislator, but his horizon is bounded by present, and it is the sciolist, more often than the statesman, whose eyes seek to penetrate beyond its limits.

The task of those fathers was alike fixed and largely limited by the immediate necessities of their time. The independence which had been won by sword and the Union which had been enforced by war were in danger in the midst of peace. Mutual jealousy had

taken the place of opposition to the encroachments of the foreigner, and those who had taken up arms in defense of their rights as Englishmen were forced to reluctantly admit that those rights were of little value and in danger of destruction unless supported by the framework of a constitution like unto that which they had inherited from their English ancestors, but modified to suit the circumstances of America. It was theirs to effect a more perfect Union, and, in so far as in them lay, to secure the blessings of liberty for themselves and their posterity forever. The Union was an instrument so perfectly adapted for their every political purpose that it may be considered their end. That Union they accomplished. That liberty, coupled with domestic peace, they secured for themselves and for their children for more than two generations, and they are not to be derided if they were unable to bequeath to us an inheritance unburdened, not only of the toils of its acquirers, but of the efforts necessary for its preservation. The Union was the great instrument chosen by them for the accomplishment of all they most desired. During their lifetime and long after, the instrument was sufficient for its object, and they well might hope that the mansion that sufficed their needs might not be ill-adapted for those of their posterity. If they were mistaken in that expectation the children reared at the paternal hearth and strengthened by the example of the paternal virtues, unless utterly degenerate, could be relied upon to prepare a habitation suited for themselves. With a change of mood that changes a prayer into an exultant faith, we can apply the words blazoned upon the bench of our Supreme Court in Austin, and confidently assert *"Sicut patribus nobis est deus."* There were men before Agamemnon—and since.

The constitution thus formed under the mingled influence of compromise and immediate need was apparently singularly inelastic. That inelasticity, often a subject of reproach, was one of the imperative conditions necessary for its formation. Such was the excusable jealousy of the times that facility of amendment would have been an unanswerable argument against expediency of adoption.

Almost as soon as it was ratified, there was a demand for a national bank, apparently so universal and well-founded that it was granted without much consideration of its constitutionality, and yet we may be permitted to surmise that its constitutionality is based as much upon supposed necessity and general acceptance as upon either the letter or the spirit of the fundamental law. A full generation passed before the question was decided in the Supreme Court. The charter was sustained by the opinion in Mc-

Culloch vs. Maryland, an opinion which may still be regarded as the very citadel of the Federal fortress. It has become, in fact, a part of the organic law, but lawyers, members of the most catholic, the most liberal and the most independent of the professions, will permit one of the humblest of their brothers to taint obedience with a look of doubt and to surmise that a different decision might have been more consonant with the law and even with expediency. Chief Justice Marshall might have reflected that a government such as ours can not in general authorize others to do that which it can not do itself by its duly commissioned officers. If it had been proposed that the United States should themselves conduct a bank, should discount notes, and advance moneys on bills of lading or upon personal security, it is more than probable that the Supreme Court would have condemned the idea. And, yet, it is difficult to distinguish it from the one sustained in McCulloch vs. Maryland. That decision, although rejected and denounced by Andrew Jackson, has since been followed and expanded. The national banks are still with us. Every Congress charters corporations to engage in interstate or foreign commerce. If the United States can create such corporations, can they not also determine that married women, minors and others not *sui generis* may engage in such commerce, any law of any State to the contrary notwithstanding? A few years after the charter of the Bank of the United States came the Louisiana Purchase. Its constitutionality was doubted by none more than by its authors, but again expediency, absolved by popular approval, prevailed. The constitutional question was quietly waived and a precedent established that has not been suffered to become dormant from lack of application. If the very generation which sent its delegates to the Philadelphia Convention and which had been reared amid traditions of provincial jealousies and opposition to central power could thus tacitly admit that supposed necessity is not merely an occasion for new legislation, but is also an interpreter of the old, we need not wonder that men of later days, brought up with a conviction of the infallibility of the Union and the supremacy of its Congress, should have solemnly determined that, save in the original Thirteen States, the Constitution lies dormant and entranced until awakened by the magician's wand of Federal legislation.

The new nation began to take its place in history. Its people insensibly became bound together by traditions of common achievements and by memories of sufferings endured together. Thirteen States created the Union. Some thirty-two States have been created by the Union, and their people naturally worship their cre-

ator, and unconsciously yield to it an homage denied to the creature.

Washington and Jefferson knew that they were Virginians before they had ever heard of Britain or America. Our children, gentlemen, know that they are Americans long before they become aware that they are also Texans. The world has shriveled enormously during the last hundred years. Improved methods of communication have brought us closer and closer together. Nearly every man has visited many States and may have resided in several. The cars click and sway as they pass from rail to rail upon their journey, but no sound or motion denotes their transit over the boundary between the oldest and most historic States. Our States are colored differently upon our maps. Are they colored differently to our fancy? No one decision, perhaps, shows the influence of these impressions, because they are all alike colored by them. Our judges were reared in the midst of them, and basic habits of thought thus acquired are not readily to be subverted by the most logical constitutional arguments.

The Civil War and its consequent reconstruction accustomed us to the spectacle of the fullest exercise of the Federal might. Virginia and the Carolinas were mere military departments governed by the sword and pillaged by emancipated serfs. The Legislature of Louisiana was expelled from its hall at the beck of a soldier of fortune, an unnaturalized foreigner, whose commission as colonel in the service of the nation invested him with a power never entrusted to Washington. Men who inflicted or endured such as this were neither astonished nor indignant when Congress, with the sanction of the courts, at the expense of alien and less virile races, taxed without representation the inhabitants of the coasts discovered by Columbus, and denied trial by jury to those of the island where Magellan died. There is yet another cause which is but a consequence of the others and of the slowly waning vitality of the States. The political ambition and ability of the country is to be found enlisted under the Federal banner. As the Union became a nation first and then an empire, it offered a more and more attractive field for the energies of the most gifted of its sons. State politics seem more and more parochial to men who see before them the vision of swaying the destinies of millions, and of making themselves heard and felt in the councils of assembled nations. They inevitably regard local honors and State office as a mere doorway opening to the pentralia of Federal power. Texas is a State more populous, more wealthy and more homogeneous than was the nation governed by Washington. Its brief history can furnish a parallel

for every memorable event from Thermopylae to the capitulation of Paris, from the secession of the Roman plebs to the Declaration of Independence, and yet its executive seat is largely valued as a mere stepping-stone to the curule chair of Senator of the Union. Small wonder it is that successful statesmen magnify the powers of the government which they administer. By such do they receive an increase of glory!

Nor is such a spirit absent from the calmer, if not loftier, atmosphere of the bench. None felt it more than John Marshall, the greatest legislator yet known to history. It is a maxim of our common law that it is the duty of a good judge to amplify his jurisdiction, and in none of the duties of his great office did that greater son of Virginia and of the South ever fail or falter. Marbury vs. Madison, Cohen against Virginia, the Dartmouth College cases, are all epochs in our history. All by legislative subterfuge, or by still broader decisions have been overruled, but each contributed to the growth and nurture of the Federal giant, and each showed that their writer had pondered, not without profit, the ancient axioms of the law. He found the States separate pearls, loosely bound together by the golden thread of the Constitution; through him, more than any other, they are now but the stones of a Gothic cathedral, important only for their contribution to the completion and grandeur of the whole. Commercial enterprise and avarice, as usual, have obeyed the wand of ambition and authority. Partly on account of the laxity of State administration, but mainly because the Union offers a broader market and safer investment and because trade is the camp-follower of power, the wealth of the country has always been the henchman of the Federalist.

Lawyers with their reverence for precedent and respect for the judicial office are apt to regard the decisions of the courts as the Urim and Thumin by which alone the hieroglyphics of the Constitution can be interpreted.

This is but a partial view. A practical construction by the executive or by the Legislature is always of an almost equal importance and is at times prepotent. Witness the acquisition of Louisiana and the treaty of Panama. It would be difficult to find a direct or implied constitutional warrant or judicial decision in favor of our Department of Agriculture, or the Fishery Commission, or our recent bounties on domestic sugar, but a Guadalupe farmer, the son of a soldier who fell at the Wilderness in the ranks of Hood's Brigade, who never voted anything else than the Democratic ticket, and who grumbles because his child is taught at school that Abraham Lincoln was a great American whose virtue and patriot-

ism are even more evident than his genius, will at once abandon his somewhat nebulous belief in State rights and the reserved powers of the people when informed that the congressional appropriation to repel the invasion of the boll weevil is a covert intrusion upon the sanctity of both. The assertors of those rights and the vindicators of the reserved powers are at times unduly discredited by reason of the causes they have espoused and the defeats they suffered. To the popular mind, the defenders of the States are the secret enemies of the Union, and at the hustings as well as in the Federal courts the skeletons of slavery and secession clank within the advocate robes of the strict constructionist.

We have seen that instinctive patriotism, wealth, enterprise, genius and ambition have inevitably become the grenadiers of centralism, who can pardonably confuse the suggestions of interest and emotion with the austere voice of duty.

There is yet another reason. The United States can, not only legislate, but they govern and administer. From Alaska to Florida the acts of Congress are enforced with a uniform vigor and a substantial impartiality unknown to our State enactments. The executive officers of the nation, at the peril of official existence, obey the orders of the President. Its judges are removed by their tenure of office from the contamination of local influences and from the abasement of personal candidacy at elections governed far more by the machine than by the will of an enlightened and independent constituency.

Let Colorado be our example. There the "Cormorant and Commune," the anarchist, and the anaconda, writhe and wrestle in the devil's brew of a wierd, reeking welter, like unto which English lands had never yet beheld. Law, impersonal, all-pervading, which knows no limitations of time, place or person, is recognized only by its absence. So far as the other States are concerned, it is more or less the same. In Democratic Texas and in Republican Illinois, you can see more violations of State laws within one hour than there are visible infractions of Federal statutes to be detected during a year's travel from one end of the country to the other. Dormancy first and then the nothingness of death are the portion of inaction. If the States would survive, they must perform their duties and manifest their vitality by their action. The microbes of disease are rejected by the bodies vigorous with life and exultant with activity; they find easy access and ready prey in the circulation of those whose torpor has already marked them for the tomb. The States have too many laws and too little law. Unless the State places the crown of authority upon the brows of its own

officers it will be usurped by the Federal. Power like nature abhors a vacuum. Our law-making organization is fully developed, but practically we have no State executive. The State Constitution commands the Governor to enforce the laws, but the command is a mockery. Mrs. Partington is ordered to resist the Atlantic, and is not even provided with a broom. Our first magistrate is not entrusted with any of the real powers of a Chief of State, and duty can never exceed ability. Give the Governor authority to require subordinate executive officers to obey the law by enforcing it, and we will be spared the humiliation of seeing the Federal Law a terror to the evil-doer, while that of Texas is the mockery and too often the instrument of local influences.

"Whisper it not in Gath," but say it boldly in Texas; "proclaim it not in Ascalon," for Ascalon is distant, and has neither ear, voice nor vote, but speak it to our fellow-citizens, "The State will lose its rights unless it performs its duties." The orderly citizens of the country are being slowly weaned away from their attachment to an impotent, even if local, government. Legislation is now discussed everywhere before it receives the seal of adoption in the halls of Congress. From what has been said it may readily be divined that an act of Congress or an action of the executive which has been approved by the vote of a dominant party will find a macadamized road to the goal of judicial sanction. That the powers of centralization may be carried too far will be denied by none. That the limit has long since been reached is asserted by many. That the uniformity and centralization of the later Roman Empire is not conducive to the rugged virtues which give men the spirit to assert their individual, as well as their national, existence is manifest from all the facts of history. The *Pax Romanus* prepared Alaric's way. A tideless sea is necessarily stagnant, alike the cause and abode of Death, and perhaps the New Zealander, as he stands upon the ruins of London Bridge, will see in this supine submission to a distant and irresponsible authority a slowly gathering "Twilight of the Gods,"—fit prelude to the tremendous scene, when

"Thy hand, Great Anak, lets the curtain fall,
And universal darkness covers all."

But I would not end with what Francis Bacon calls "A hearse-like strain." Let Hope suggest optimism not altogether sanctioned by reason, and I will close with an adaptation of the language of one of the greatest poets who ever meshed thought and music in a web of words:

"I doubt not through the ages, one unceasing purpose runs,
And the Union still will broaden with the progress of the suns!"

OUR LAWMAKERS—THE JUDGES.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

CLARENCE H. MILLER,

OF AUSTIN.

In considering possible reforms in lawmaking, we must take into account the power of the courts to make law by applying in their decisions old principles to new conditions, as well as the power of direct legislation granted to our representative assemblies. Much might be said of our need of better equipped representatives and in criticism of their ofttimes hasty and slipshod work. In view, however, of the already appalling and yet rapidly increasing bulk of court law that is being launched upon us, I believe I can better employ my time by directing your attention to some recently advanced suggestions for an improved method of judicial legislation.

To avoid a quarrel with some of my brethren of preconceived ideas, I should say that whether judges merely discover and declare the law or make it in the legislative sense, is immaterial to my present inquiry; it is only necessary to recognize the undisputed fact that the great body of our substantive law relating to individual rights resides in judicial utterances. Magna Charta itself was merely declaratory of the unwritten law as it was aforetimes.

The unwritten law theoretically rests in the breasts of the judges; it has always theoretically existed without diminution or addition; and, as each case comes up for decision, that part of it applicable to that one case has been discovered by the courts through the study of immemorial customs, and of maxims and

precedents. But practically it is judge-made. It has been built up case by case into a system of connected legal principles from the study and experience for centuries of a line of singularly wise and intelligent judges, who were deeply imbued with a sense of legal justice. A mere inspection of the books shows that the great body of our law is not of legislative origin. It has not been struck off into fragmentary statutes, but is the untrammeled growth of judicial thought paralleling in its progress towards justice, the moral and intellectual development of the liberty-loving Anglo-Saxon races.

The unwritten law in its earlier growth was marred and distorted by a too great disregard of equity and a too rigid adherence to fixed forms of procedure. But the people whose social and national life it reflected were too wise and conservative to seek to correct the consequent hardships and absurdities by statutory means. The courts of chancery arose and proceeded, as had the common-law courts before them, to cautiously feel their way, step by step, out into the expansive fields of natural justice. And so our law in the main is, as it was in the olden days, the slow, but on the whole symmetrical, product of the courts, as distinguished from the hasty and not always consistent generalizations of the Legislatures.

I should perhaps explain that I do not mean by preferring judge-made law to favor a merging of the legislative functions of government into the judiciary. That department already has its full share of governmental powers. The very courts, however, that for centuries have been engaged in this method of lawmaking have recognized and insisted upon preserving separate the fundamental functions of government. But, notwithstanding this disclaimer, judicial law, in the sense in which I use the term, is as old as Anglo-Saxon institutions. By the use of the doctrine of precedents—the characteristic feature of English and American jurisprudence—the evils that might be expected to result from the judiciary exercising legislative functions have not appeared. It is true that Bentham and his followers have railed against what they call the despotism of judge-made law and theoretically have made a well-nigh unanswerable argument. But we have a complete practical answer to their argument in the history of the English people for the last eight centuries. Among no other nations has there been an equal measure of individual liberty. From this experience it is safe to conclude that the courts will continue to exercise the power of lawmaking conservatively, and will lay down new principles or apply the old ones to new conditions only as the needs of advancing civilization require.

But the danger of judicial legislation in its hurtful sense will be real when the courts lend an ear to those specious moralists who would have them attain in each case natural justice. So far, with rare exceptions, the judges, both of law and of equity, have declined to substitute as the basis of their decisions abstract justice for precedents. They have been wise enough to recognize that the sense of justice of an individual judge unrestrained by law means one law for one case and a different law for a precisely similar case, according to the moral sense of the occupant of the bench, which, in truth, is judicial despotism.

"Whoever," said Associate Justice Roberts in Duncan vs. Magette, 25 Texas, 245, "undertakes to determine a case solely by his own notion of its abstract justice breaks down the barriers by which rules of justice are erected into a system and thereby annihilates the law."

While the courts hold to these views, they will go on developing new law out of old cases or judicially legislating, as I call it, without inflicting upon the body politic the evils that are intended to be avoided by creating separate departments of government.

But the practical question recurs each year more pressingly: What are we to do with the stream of unwritten law that pours forth in such swelling torrents as to threaten to swamp the understanding of the most tenacious admirers of Anglo-Saxon jurisprudence? The law, it is estimated, must already be searched for in over one-half a million cases reported, many of them at great length in upward of ten thousand separate volumes. The judge or lawyer who is zealous enough to attempt to trace a doubtful principle through this bewildering labyrinth is lost. His client's only recourse is to run the gauntlet of inferior judges until he at last is handed down the mandate of the Supreme Oracle. Tennyson characterizes this condition as

> "The lawless science of the law,
> That codeless myriad of precedent,
> That wilderness of single instances."

Sir Henry Maine sees in this increase of cases a probable collapse of the system. He says:

"Hence that frightful accumulation of case law which conveys to English jurisprudence a menace of revolution far more serious than any popular murmurs, and which, if it does nothing else, is giving to mere tenacity of memory a disgraceful advantage over all the finer qualities of the legal intellect."

Shall we in sheer desperation discard all precedents and adopt

in their stead, as did the Roman empire in the early days of its decline, an all-embracing code? There is an undoubted tendency to this course, and much may be said in its favor, and especially as to those more or less mature branches of contract obligations that lend themselves more readily than others to codification. But believing as I do that judge-made law as to most subjects is better and safer than that which comes from our legislative halls, I think we should, before abandoning a system that has served us so long and well, first make the experiment of attempting to improve its methods. Time will not permit a comparison of the theoretical merits of the code and common law systems. I might say, however, in passing that I have read no satisfactory answer to the objection that codes exhibit a Procrustean disposition—a tendency to force rights and wrongs into fixed molds on the one hand, or to leave them when not so reducible to the arbitrary determination of the judges. The wisdom of man can never devise a code flexible enough to cover in advance every new legal question that is to be evolved out of the moral and intellectual progress of a nation, and these residuary questions must therefore be distorted into a class into which they do not naturally fall or be decided upon general principles. I must confess, too, to a dislike in law as in other living sciences of dogma displacing growth, or, as expressed by Mr. Bishop, "That fatal 'Be it enacted'—that evil part which transmutes the golden reason of the common law into the pig iron of command."

But, admitting the theoretical superiority of codification as a means of escape from the overburdening weight of the unwritten law, who is learned and wise enough to do the work satisfactorily? Experience with statutes that have been passed does not justify any hope that our Legislatures would be equal to the task. It would stagger the abilities of a greater mind than Tribonian's to eliminate the obsolete and reconcile the contradictory in the untamed common law and then gather up the remains and arrange and parcel them out into infinite details upon a rationalized all-embracing scheme. When we consider that it required over twenty years of work by eminent jurists, scientists, law professors, and statesmen in the German empire to perfect the code that was enacted in 1896 in that country, and that the codifiers started as a basis with Justinian's immortal work and the later codes founded upon it, we may gather some idea of the task involved in reducing into a logical form the vast materials of a nation's law.

But if an all-wise commission were found to prepare and recommend such a code to our Legislature, the advocates of special interests and the ambitious politician, more intent upon self-ad-

vancement than the public good, would, if past experience is to be regarded, destroy and distort it beyond recognition by innumerable amendments. Will a Legislature that can not without repeated trial pass a constitutional anti-trust act or give to the people a perfect election law be likely to adopt a satisfactory code?

On the whole, we had better continue to receive the great body of our legal rules from the courts, and rather trust for relief to an improvement in their methods of performing their legislative functions. Already there are in vogue better methods of digesting the mass of case law. An exhaustive digest of law upon a simple and logical plan has recently been completed which greatly lessens the labor of ascertaining everything that has been decided upon any particular point. The legal encyclopedias of today are assisting in this direction. And, while many of the text-books and commentaries that are being published mislead and confuse rather than enlighten the seeker after first principles, there are not wanting jurists who have wrought out of the chaos of cases the ultimate rules of law, reduced them to their smallest proportions, and arranged these upon a scientific plan of classification. Such efforts in able hands, together with the researches into historical and comparative jurisprudence that are going on today, promise a better insight into the great underlying principles of the unwritten law and a clearer view of the incongruities of its inter-related parts.

It has been observed, too, that the increasing unwieldiness of the unwritten law is from its very nature to some extent relieving itself. The impossibility of exhausting the authorities or reconciling them on any given doubtful question is relegating the case lawyer to his proper place and re-establishing the importance of resort to elementary principles. The succesful lawyer and eminent judge is today, as before case law threatened to collapse under its own weight, he who searches out the foundations of our jurisprudence and rests his contentions upon them.

While these tendencies are in some degree lessening the oppressive weight of case law, the courts by improvement in their written opinions can give the largest amount of relief. Our appellate judges appear to misconceive the functions of written opinions. As pointed out by Mr. Bishop in his work on "Non-Contract Law," Sec. 1327, a judge discharges every particle of his duty, moral and legal, when in deciding a case he simply gives his reasons for deriving the particular conclusion of law from its special facts. He is not expected, nor has he the right as a public official, to write a learned treatise on the general law of the subject. What

he so writes is not law but dicta. Such exposition is the privilege of the text-writer whose lucubrations the members of the bar read or not as their time or curiosity may determine.

Prolixity is a natural fault in the lawyer; it is without excuse in the judge. If a principle decided is so obscure as to make the case involving it truly leading, one elaboration of the doctrine is enough. A concise statement of the significant facts of such later cases as come within the new rule with a citation of the authority is all the profession needs for its guidance.

The American Bar Association has declared in favor of shorter opinions. Mr. Justice Gray, in a paper read before the Association, also advocated this means of improving the present inflated condition of the unwritten law, and estimated that the bulk of future law reports could by this means be reduced, without in any way lessening their value, to one-fourth of what it is now. At one time reporters exercised the power of suppressing and eliminating the redundant, but now everything written is printed and referred to as authority; and, as Justice Gray remarks, it is for the judge "to prevent the preservation of irrelevant and superfluous matter by the simple process of not writing it." Litigants in the particular case adjudicated have no right to a written opinion, because the judgment entered completely disposes of the controversy as to them. It is not the duty of the court to convince the unsuccessful litigant of the correctness of its conclusions. The true purpose of written opinions is to serve as precedents. They ought to be dispensed with in many cases. And, in those involving novel points or applications of settled principles to new states of fact, the reasons of the court could with rare exceptions be better stated by the use of fewer words. Multitudinous quotations of authorities might profitably be omitted. The cited authorities can be read in the originals and their true bearing be better so understood than through the medium of scattered extracts from them. The far-reaching opinions of Mansfield and Marshall are models of brevity compared with many of those of our appellate judges.

It is undoubtedly true that it is harder for judges to discard, in stating the case in hand, all the irrelevant facts that play no part in individualizing it, and to show in a few apt words the legal relations that arise out of these significant facts, but the corpulency of our unwritten law, if not the reputation of the writer of the opinion, calls loudly for this extra service.

"Lawyers and judges," says Justice Gray, "will alike bear me out in saying that the elaborate text-book opinion in which a whole branch of the law is expounded, regardless of its application to the facts of the case in hand, is confusing and often absolutely

misleading; and the time necessarily expended in discovering what the court has really decided in that case is a source of constant vexation."

I respectfully submit these views to the Association, and especially to the builders of our Texas jurisprudence, under the belief that if they are laid to heart we may continue to hold fast, even in these modern days of reform, to the essential features of the unwritten law of our ancestors, and that, by merely pruning and supplementing it when need be by maturely considered and well drawn statutes, we and those who may come after us shall not cease to dwell in a land

"Where freedom broadens slowly down
From precedent to precedent."

A DEFENSE OF THE "TEXAS RULE" IN THE MATTER OF IRRIGATION.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

JUSTICE OCIE SPEER,
OF THE COURT OF CIVIL APPEALS.

Aside from the importance of the subject, an excuse for discussing a question that has once before received consideration in an able paper before this Association is found in the fact that there is a very widespread belief that the Texas courts have adopted a rule with respect to irrigation from flowing streams, whereby a riparian owner may lawfully exhaust the supply of the stream, to the exclusion of all owners below him, who may desire to use the water for a similar purpose. This has been denominated the "Texas Rule," and is probably no more clearly stated than in the conclusions reached in the paper referred to, wherein its author, Prof. Yancey Lewis, formerly of our State University, uses this language: "We may sum up the result of our investigations as follows: * * * Within this (arid) section riparian owners, as between themselves, and for irrigation purposes, may divert the waters of the streams to the extent of exhausting the supply for this purpose, without regard to the rights of other proprietors; whether they may exhaust it as against the natural wants of the lower proprietors is not decided; that there is a priority of right, determined not by priorities of appropriation, but by superiority of location with reference to the head of the stream." Proceedings of twenty-first annual session Texas Bar Association, 1902, page 112.

Mr. Farnham, the most recent writer upon the subject of waters and water rights, also recognizes that such is the rule with us, and says that we have carried the right to use the water for irrigation purposes further than it has been carried elsewhere, and further than can be supported either by principle or authority. He understands our decisions to hold that the upper owner has the right to exhaust the stream for irrigation purposes as against the right of the lower proprietors to use it for the same purposes. Farnham on Waters and Water Rights, Sec. 604.

These references will serve to show what is the commonly accepted interpretation of the decisions of our courts upon this important subject. The eminent respectability of each of the authorities mentioned, and the confessedly baneful effect of such a rule upon the development of the arid and semi-arid portions of our State, where irrigation is available, render it imperative that such interpretation, if incorrect, should be refuted, and the true holding of our courts pointed out; for if this is the rule, as said in the concluding sentence of the paper first referred to, "it is believed that our Texas system of irrigation law has in it the elements of jeopardy to investment which must necessarily retard and hinder the full development of the use of our streams for irrigation purposes."

I deny that this interpretation is the true rule of decision in this State.

Let us now examine those cases in which the decisions are relevant to this issue. First in point of time is Rhodes vs. Whitehead, 27 Texas, 309, decided by the Supreme Court at its Austin term, 1863. It is there said by Mr. Justice Moore: "It may be admitted that the purpose of irrigation is one of the natural uses, such as thirst of people and cattle, and household purposes, which must absolutely be supplied; the appropriation of the water for this purpose would, therefore, afford no ground of complaint by the lower proprietors, if it were entirely consumed." Evans vs. Merriweather, 3 Scammon, 496.

Next in order is the case of Tolle vs. Correth, 31 Texas, 362. In the decision of this case the court quotes approvingly the language above set out, and adds that the New York, Massachusetts, and English authorities "are founded on the principle or maxim, 'The water runs, and let it run.' 'Every one has a right to have the advantage of a flow of water in his land without diminution or alteration.' A moment's reflection will enable any one to see the propriety of these maxims where water is useful only in its

flow, and as subservient to mechanical or manufacturing purposes. But in a country or State where water is useful for agricultural purposes, and where the sovereign power grants, for a nominal consideration, water for the purposes of irrigation, these maxims do not apply; instead thereof we must substitute, 'water irrigates, and let it irrigate.' "

In 1889, in the case of Mud Creek Irrigation, Agricultural & Manufacturing Co. vs. Vivian, 74 Texas, 170, the Supreme Court further said: "It seems to be the rule of the common law that a riparian owner has no right to use the water of the stream for irrigating his lands provided it interferes with the uses of the water by those who own the land upon the stream below. That this is a proper rule in England and in those States where the rainfall is sufficient for the purposes of agriculture, we freely concede; but we are of opinion that in those sections where irrigation is necessary to the successful pursuit of farming, it should not apply. What is not a necessary use in the one case becomes necessary in the other. Evans vs. Merriweather, 3 Scammon (Ill.), 496. It was so held in Tolle vs. Correth, 31 Texas, 365, and though this decision was criticised in the subsequent case of Fleming vs. Davis, 37 Texas, 173, we are of opinion that it recognizes a correct rule of law as applied to the present case. We think it matter of common knowledge that there are portions of our State where the business of agriculture can not be successfully prosecuted through successive years except by irrigation; and it is to be inferred from the allegations of the petition that the section where the stream in controversy is situated is of that character. We think, therefore, that the defendants had the right to divert the water which flowed in the stream along or through their lands for the purpose of irrigating them, although the effect of such use was to leave the plaintiff corporation an insufficient supply for the same purpose."

In the still later case of Barrett vs. Metcalfe, 12 Texas Civ. App., 247, 33 S. W. Rep., 758, in which case a writ of error was refused by the Supreme Court, the Court of Civil Appeals for the Third District, speaking through the late Mr. Justice Collard, said: "That the irrigable quality of land is an element of its value in this State can not be denied, and especially is this true in the dry and arid districts. A lower proprietor can not complain that one above uses the water of a stream for ordinary purposes even though the water is thus exhausted. At common law such uses include all water necessary for domestic purposes, for drinking, washing, cooking, and for stock. Gould on Waters, Secs.

205-208. This ordinary use at common law does not include use for purposes of irrigation. This is denominated 'extraordinary use.' But in this State it is settled that irrigation is classed as ordinary use of the water of a flowing stream, with the right in the proprietor to consume all the water of the stream reasonably necessary or required for such use." This case quotes at length from the cases hereinbefore noted.

As having a possible bearing upon the question, we quote next from Cornick vs. Arthur, 31 Texas Civ. App., 579, 73 S. W. Rep., 410: "The court was correct in sustaining the demurrer to that branch of the plaintiffs' case in which they attempted to set up an exclusive right in the waters of Dove creek for irrigation purposes. If any such right existed, there were no facts pleaded that would take the case out of the rule announced by this court in Barrett vs. Metcalfe, 33 S. W. Rep., 758, 12 Texas Civ. App., 247, and in Irrigation Co. vs. Vivian, 74 Texas, 170. The plaintiffs were lower proprietors on the stream in question; and, according to the rule announced in the cases cited, the facts pleaded in that portion of the plaintiffs' petition to which the court sustained demurrers did not state a case that would authorize the lower proprietors to interfere with the rights of defendants in error and others situated on the stream above to use the waters therein for irrigation purposes."

These, it is thought, constitute all the authorities to be found which in any way tend to support the interpretation of the rule announced in the beginning of this discussion. But, indeed, it must be confessed that to the casual observer they seem to be ample; and that if the investigation were to end here the superior rights of the owner furthest up the stream are firmly established. But let us pursue the investigation a little further. Let us look somewhat more minutely into these cases and ascertain their value as authorities for the proposition that an upper riparian proprietor may exhaust the stream as against the rights of a lower owner to make a similar use of the water. Let us, if you please, cross-examine them, and to the cross-examination add the affirmative weight of other decisions yet to be noticed.

Undeniably, the language quoted from the opinion in Rhodes vs. Whitehead is the fountain source of the apparently irresistible stream of error which has permeated the minds of the profession, not even barring the courts. It is pertinent then to inquire, what were the issues in that case and what the decision? It was an action by Rhodes to recover damages occasioned by a dam erected by Whitehead and others across the San Antonio river, and to

abate the same as a nuisance. The petitioner alleged that he was the owner of two lots of land within the limits of the city of San Antonio, which were bounded on the east and south by the San Antonio river; that he had owned the same for more than twenty years before the trespasses complained of were committed. That the defendants had erected a dam across said river by which the water was raised over three feet and overflowed the lots of petitioner, by means whereof much of the trees, vegetables and garden of petitioner were destroyed and the value of said lots was deteriorated; that said dam caused stagnant pools of water upon the lots of petitioner, which produced sickness in his family. There was also an allegation of injury to the inhabitants of said city of whom petitioner was one. He prayed for his damages and to have abated as a nuisance the defendants' dam. The defendants denied the right of plaintiff to recover damages, and asserted a grant from the former government of the right to erect a dam at that place, for the purpose of irrigating the lands of the mission Concepcion, which right had been confirmed by the State of Texas and carried into effect by the action of the authorities of the city of San Antonio. They also asserted an exercise of the right for more than a hundred years, and denied that the dam was a nuisance. The case, barring the feature of nuisance, was held to be controlled by an application of the principles of servitudes, and for an erroneous charge in this particular, and because of the insufficiency of the evidence to support a verdict for the defendants the cause was remanded. It is in vain we look to this case for an authoritative adjudication of the relative rights of upper and lower riparian owners to the use of water for irrigation. Such question was not even remotely before the court. So that the admission that, "the purpose of irrigation is one of the natural uses, such as thirst of people and cattle, and household purposes," and the further statement that "the appropriation of the water for this purpose would, therefore, afford no ground of complaint by the lower proprietors if it were entirely consumed," is, as has been repeatedly pointed out, a dictum of the most virulent type. Union Mill & Mining Co. vs. Ferris, 2 Sawyer, 194. In this connection it is interesting to note that the only authority cited for this dictum is itself a dictum of the Illinois Supreme Court in a case where there was no question whatever of irrigation. The case of Evans vs. Merriweather, 3 Scammon, 496, which is the one referred to, was a contest between two mill owners over the right to the use of the waters of a small stream which were entirely inadequate to the requirements of both. The opinion, which in the main is an able

one, and which correctly disposes of the questions involved in that case, contains this language: "The supply of man's artificial wants is not essential to his existence; it is not indispensable; he could live if water was not employed in irrigating land, or in propelling his machinery. In countries differently situated from ours, with a hot and arid climate, water doubtless is absolutely indispensable to the cultivation of the soil, and, in them, water for irrigation would be a natural want. Here it might increase the products of the soil, but is by no means essential and can not therefore be considered a natural want of man." It is regrettable that expressions so foreign to any issue in the case ever find place in the opinions of our courts, and more regrettable that other courts make precedents of them. But possibly an examination of the language in connection with which Justice Moore's famous admission occurs will serve to give us a truer insight into what was the state of mind of that jurist with reference to the relative rights of the riparian owners. "It may be admitted," etc., says he, "Yet, unless he has acquired the right of doing so (exhausting the stream) by grant, license, or such adverse possession as will give him the right by prescription, he can not do it in a manner that will unreasonably detain the water not consumed from the riparian owners below, or throw it back beyond the line, where it passes from the land of the owner above him. For every party must exercise his own rights, and use his own property in such a manner as shall not cause detriment to that of another. Hence every injury to a water course, as by improperly diverting it, and every injury by means of a water course, by throwing the water back upon the land of another above, is repugnant to this principle and is a species of tort denominated a nuisance, for which a party is entitled to redress by an action in which he shall recover damages, and that such nuisance shall be abated, or he may enter on the land of the other and abate it himself." The case is therefore authority for the proposition that one will not be allowed to back the water over another's land by the erection of a dam for irrigation purposes across the stream, in the absence of a grant or prescriptive right to do so, even though it should be admitted that irrigation is a natural want; but not for the proposition that such admission is a true one. But, however this may be, it is certain that the language is a dictum, unsupported by the authorities and announces a proposition contrary to every principle of law and to every innate sense of right. To say that irrigation is a natural want, such as thirst of people and cattle, which must absolutely be supplied even to the exhaustion of the stream is but to say that

the upper owner may water his 640 acres of alfalfa, even though the lower owner and his beasts are perishing for drink. Can a proposition so monstrous be maintained? Can this be Kent or Blackstone? Can it be law?

Tolle vs. Correth was decided in 1868. The court states the question for adjudication to be, "Whether a proprietor of a tract of land in which originates a spring forming a stream running in a channel through his land into the land of another person, has a right to divert the stream from the natural channel, and cause it to overflow and irrigate the land, provided the stream resumes its original channel before it enters the land of the adjacent proprietor?" It is pertinent here to say that the complainant in the case, a lower proprietor who owned a mill situated upon the stream, alleged that in dry seasons the water was used by defendant to such an extent as to prove injurious to plaintiff's machinery. There was no allegation that defendant wantonly and maliciously made use of the stream, or that he used more than was necessary for agricultural purposes. "This," said the court, "he had a legal right to do. Plaintiff is presumed to know that whoever owned the land above and adjoining his land had a right to use the water running through it and on it for irrigating the land, and when he erected his mill he did not and could not lessen the defendant's vested rights, and whatever damage he may sustain is *'damnum absque injuria!'* " The opinion closes with this significant reservation: "We would not be understood as deciding to what extent a stream can be used for irrigating purposes. The relative rights or exclusive rights are not before us."

But what of Mud Creek Irrigation Company case? This is much relied on as deciding in line with the dictum in Rhodes vs. Whitehead. The petition of the irrigation company alleged in substance that the plaintiff company was duly incorporated under the general law for the purpose of constructing and maintaining two irrigation canals on the creek named, at a point designated in the charter, to extend in a general direction down the stream, where they were to re-enter the channel; that the works were completed and received by the State, and that it had opened a valuable farm with lateral ditches, which was cultivated by the use of water drawn through the canal, and that the defendants had built a dam above its works which held back and diverted the water so that it had ceased to flow down its canal. It also alleged an uninterrupted use and enjoyment of the water in the stream for the purposes of irrigation for more than ten years before the defendants erected their dam, and by reason thereof plaintiff claimed the

exclusive right to the use of the water by prescription. The court, speaking through Mr. Justice Gaines say: "No brief has been filed in this court by appellees, and we are therefore left to conjecture upon what precise grounds the petition was held insufficient. But it is to be noted that, while it may be suspected that the plaintiff is the owner of land abutting upon the stream and perhaps crossing it, it is nowhere distinctly alleged that such is the fact, nor is it averred that it has acquired any right in the water by purchase or condemnation from any riparian proprietor. The action, judging from the averments in the petition, seems to be based in part upon the theory that the charter of the company, by designation of the locality of the canal, gave it the exclusive right of the water for irrigating purposes in that locality. This we think a mistake. The franchise by the charter was the usual powers and privileges conferred upon such corporate bodies as should be organized under the general law of incorporation, together with the rights to acquire by gift, purchase, or condemnation, such property as was necessary or proper to carry out the objects of its creation. Acts of April 23, 1874, Sec. 58. The charter conferred the right to acquire water privileges, but it did not confer the privileges themselves. This principle was announced by this court in the case of Tugwell vs. Eagle Pass Ferry Company, Austin term, 1888. We there held that the ferry company, by becoming a corporation under the general law for the purpose of maintaining a ferry over the Rio Grande at Eagle Pass, acquired no right to operate such ferry without procuring a ferry license from the commissioners court of the county in which the town is situated. The corporation by filing its articles of incorporation in compliance with the law was authorized to establish and maintain a ferry as a corporation at the point designated in its articles, but it did not acquire the ferry privilege itself. So in this case the plaintiff, by its incorporation, became invested with the power to acquire as a corporation a privilege of using the waters of Mud creek for the purpose of irrigation, but it did not thereby obtain a right to the use of the waters. That right remained to be acquired, which could have been done by either purchase or condemnation, provided the use was a public one." In this case, as in the Tolle vs. Correth case, there is a reservation worthy of notice. With respect to the rights of the defendants above to irrigate their lands, the court say: "Whether they had the right to divert the whole of it and leave an insufficient supply for the ordinary use of the lower riparian owners, we need not in this case determine." Whether the expression "ordinary use" was meant to in-

clude irrigation is not clear, but, in view of the trend of the decisions in this State, including the one under consideration, it may be fairly assumed that such was the case. But it is clear that this case can not, in any just sense, be said to be authority for the supposed "Texas rule." No lower riparian proprietor was asserting his rights to water for irrigation in the case, hence the Supreme Court evidently could not, and did not, lay down rules for the determination of the rights of such a person. To the mind of the speaker, it is clear that the citation of the Tolle vs. Correth case was apt, and the application of the law in the two cases, similar, and consistent, not only with respect to each other but also with what we shall hereafter see is the true rule in irrigation cases. It is evident that the court in this case did not consider that it had before it a plaintiff as favorably situated as would have been an owner of lands abutting upon the stream who sought to enjoin the interference by one above with his right to the use of the water for irrigation purposes.

We come now to consider the case of Barrett vs. Metcalfe. This was an action by Barrett and others having a dam across the South Concho river and ditches constructed for the purposes of irrigating their farm, against Metcalfe and others to restrain them from the use of the waters for the same purpose above complainants' dam and farm, by which use the water of the stream was exhausted, rendering the dam useless for the purposes for which it was intended. Barrett and his co-plaintiffs showed by their petition that their dam and ditch were chartered by the statute under the Act of 1875, and that they had complied with the irrigation Act approved March 19, 1889, and the act amendatory thereof, approved March 29, 1893. The trial court sustained a general demurrer and special exception to the petition. The special exception was to the effect that the acts, original and amendatory, were in violation of the Constitution, in that they sought to take private property for public use without first making compensation, and authorized the taking and appropriation of private property for private use. This judgment was sustained, the court saying: "Clearly it could not have been the intention of the Legislature to classify and grant land as irrigable and demand a special price therefor, and at the same time withhold the privilege of irrigation from the owner. We think the defendants are shown by plaintiffs' petition to own irrigable lands since they are irrigating them, that they have property rights in the irrigable character of their lands, which can not be taken from them for private purposes of plaintiffs in any case, or for public uses without compensating them for

their enhanced value as irrigable lands. The acts in question make no provision for condemning lands except for right of way, and assuredly they could not be enforced so as to take private land not intended for right of way, even though it could be taken for public uses";—certainly a most righteous conclusion, but as certainly an upsetting of the theory of the superior rights of the upper owner. If lands bordering upon a stream have a special value as irrigable lands, which they undoubtedly have, it is because they are entitled to their just proportion of water for irrigation purposes from such stream. If this right is a property right belonging to the owner of the land which the Legislature can not deprive him of even for public use without making due compensation, then it is absurd to say that an upper owner may summarily take his property by exhausting the stream above him. Of this decision, Mr. Farnham justly says: "But, after deciding that none but the owner furthest up on the stream had any right which could not be destroyed by the owner above him, the court held that the statute permitting the taking of the water from the stream without compensation to the riparian owner was unconstitutional, in that it deprived the riparian owner of his property right in the water without compensation. It is difficult to see how that result can be worked out. If the riparian owner has only a right to use such water as an upper owner permits to flow down to him, it would seem that his right is so precarious that it can not be regarded as a property right, for the taking of which he is entitled to compensation. The court was in fact applying the common law rule, while assuming to apply the modified rule of the Texas court." Farnham on Waters and Water Rights, Sec. 604. It would be a superfluity to add that the action of the Supreme Court in refusing a writ of error in this case proves no more than that that court approved the results reached in the case.

The case of Cornick vs. Arthur is of doubtful weight as an authority upon the question; the language heretofore quoted from the opinion being all that in any manner casts any light upon the relative claims of the parties to the use of the stream for irrigation. It would seem that the lower owners in that case attempted to set up an exclusive right in the waters of the creek, but upon what they based their claims, or to what extent, if any, the upper owners were irrigating, or interfering with plaintiffs, does not appear. If the case in any way has been passed upon by the Supreme Court it has escaped our attention.

So that, after our cross-examination of these cases, it is apparent that in not one of them was the question of priority among

riparian owners to the use of the waters of a stream for irrigation purposes before the court for adjudication. It is confidently believed that the discussion of the questions involved by our Supreme Court has been along broad lines, and its conclusions in the individual cases noticed are supported by sound reason and abundant authority. But that these conclusions compel, or even authorize, the inference that that court has ever thought of departing from the wholesome doctrine of equal rights and reasonable use, as among the riparian owners of the waters of a stream for irrigation, we can as confidently dispute. If further proof were needed to demonstrate that such is not the case, we have it in Fleming vs. Davis, 37 Texas, 173. This appears to be the only case in this State in which the question of the relative rights of upper and lower owners to the use of the stream for purposes of irrigation has been before our Supreme Court for decision. The discussion is, therefore, most important, and liberal quotations will be made. Fleming was the owner of the head spring of a stream some three miles long and claimed the exclusive privilege of using all its waters for purposes of irrigation. Davis, a lower owner, sued him for damages for wrongful diversion and waste of the water. To show that the question of relative rights of parties so situated was the one considered by the court, the following statement by the court will suffice: "It is contended that public necessity now requires that the rule of law which should govern all such cases should be clearly and distinctly announced by this court, and that the case at bar presents all the necessary facts to render this duty imperative. We do not recognize any exclusive right, by purchase or by prior occupation, in any of the parties to this suit. The legal and equitable rights of the parties may be regarded as equal, so far as purchase or occupation gives rise to such rights." * * * Continuing, the court say: "Let us look to the common law; a most orthodox authority reads thus: 'Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has the right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit, et debet currere, ut currere solebat,* is the language of the law. Though he may use the water while it runs over his land, as an incident to the land, he can not unreasonably detain it or give it another direction, and he must return it to its

ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he can not divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled general doctrine on the subject, and all the difficulty which arises consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbor below him, who has an equal right to the subsequent use of the same water; nor can he by dams, or any obstruction, cause the water injuriously to overflow the grounds and springs of a neighbor above him. Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural and manufacturing purposes, provided the use of it be made under the limitation which has been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex,* and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party by or over whose lands a stream passes is that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream. He must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbor. Pothier lays down the rule very strictly, that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become utterly useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law: *Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat.* (3 Kent, pp. 561-565.) This is the rule of the common law; but it has not

been everywhere recognized as applicable to the wants and condition of the people, and a maxim of the common law, *cessante ratione legis, cessat ipsa lex,* is cited to defeat the application of the rule in this State. That certain portions of the State of Texas are subject to periodic drouth, and that the growth of vegetation would be greatly improved by the artificial application of water, are well-understood facts; but whilst irrigation may be recommended by economy, must it be regarded as a thing of necessity? If so, does the necessity exist throughout the State? If not, must we lay down a rule predicated upon supposed public necessity, which is to apply only to certain portions of the State, for the reason that it could not find its predicate elsewhere?' In Arnold vs. Foot, 12 Wendell, 330, the learned Savage, C. J., delivering the opinion of the court, it was decided that where a spring of water rises upon the land of one owner, and from it runs a stream on the land of another, the owner of the land upon which is the spring has no right to divert the stream from its natural channel, although the waters of the stream are not more than sufficient for his domestic uses, for his cattle, and for the irrigation of his land. The Chief Justice also quotes from the opinion of Mr. Justice Story, 4 Mason, 400: 'The natural stream existing by the bounty of providence, for the benefit of the lands through which it flows, is an incident annexed to the land itself.' * * * The law has its certain rules, which, although not mathematically, are morally exact. This court meet with many difficulties in arriving at the moral exactitude attainable, but, we apprehend, were we to attempt judicial legislation on this subject, we should find ourselves much more at fault than we now are, acting under long and well-settled principles. Mr. Angell in his work on 'Water Courses' has very ably treated this subject, giving prominence to the opinions of able jurists who have decided the question. The case of Cary vs. Daniels, 8 Metcalf, 466, and also the case of Hat vs. Evans, referred to on page 99, as sustaining Johnson vs. Jordan, 2 Metcalf, 239. In this case Shaw, C. J., remarks: 'Every person through whose land a natural water course runs, has a right, *publici juris,* to the benefit of it as it passes through his land, for all the useful purposes to which it may be applied; and no proprietor of land on the same water course, either above or below, has a right unreasonably to divert it from flowing into his premises, or obstruct it in passing from them, or to corrupt or destroy it. It is inseparably annexed to the soil, and passes with it, not as an easement, nor as an appurtenance, but as parcel. Use does not create it, disuse can not

destroy or suspend it. Unity of title and of possession in such land with the lands above or below it does not extinguish or suspend it.' This doctrine is founded on the well-known maxim *sic utere tuo ut alienum non laedas.* We adopt this maxim as a rule for our decision in this case."

This being as we have seen the only case in which our Supreme Court has had before it for determination the respective rights of upper and lower riparian proprietors, and standing as it necessarily does without limitation or qualification by subsequent decision, it may be taken as the established doctrine of this State in this character of case. Moreover, the opinion of the court evinces much research and deep learning and may well rank with the best considered cases to be found in the decisions of our State.

But there is yet another authority which demands brief notice. In Baker vs. Brown, 55 Texas, 378, to use the language of the court, "The gravamen of plaintiff's action was that the defendants, who were riparian proprietors above him on Simpson's creek, had, by irrigating their lands from the creek, stopped the flow of water and caused it to stand in holes along and by his land, and had deprived him of its use to supply the natural wants of his tenants and stock, and had caused noxious and disagreeable smells and malarial diseases along his land and in the neighborhood. * * * Did the defendants have originally the right of irrigation to the detriment of plaintiff's right to a proper supply of the water for natural wants and domestic purposes?" * * * Answering, the court say: "To the general rule founded on the equality of right in the waters of a stream, that one proprietor could not so use the same as to essentially or materially diminish the quantity to the detriment of another, an exception is allowed in those cases in which it is used for natural wants and domestic purposes, in contradistinction to artificial or mechanical purposes. Rhodes vs. Whitehead, 27 Texas, 304; Evans vs. Merriweather, 3 Scammon, 492. Although it may be difficult to always draw with precision the line which may divide these two classes, yet it is abundantly supported by authority that the right to irrigate, when not indispensable, but used simply to increase the product of the soil, would be subordinate to the right of a co-proprietor to supply his natural wants, and that of his family, tenants and stock, as to quench thirst, and to the right to use the water for necessary domestic purposes. Hence, whether the use of the water for the purposes of irrigation is reasonable and lawful as against another proprietor would depend upon the facts of the particular case. If the stream should be sufficiently large to admit of necessary irri-

gation without unreasonably impairing the rights of other proprietors, then it would be reasonable and lawful; otherwise it would not. Applying the facts of this case to the above rule, it would follow that the defendants had no lawful right to use the waters of Simpson's creek for the purposes of irrigation, to an extent materially to impair the right of the plaintiff to the reasonable use of the same, for the purpose of supplying his natural wants and domestic necessities as before indicated, unless they have claimed this right in some mode known to the law."

In the mind of the discriminating reviewer, there can be but one conclusion. The scope of the Texas decisions has been grossly misconstrued. Not only have the courts not held that the upper owner gained any rights by his position on the stream, but they have consistently and persistently held to the contrary. What then is the "Texas rule," and what the defense? From the authorities considered, we deduce the following:

1. The familiar common law rule of perfect equality of rights, and reasonable use, among the co-proprietors of a stream is in all respects adhered to. 2. In the practical application of the rule of reasonable use, we hold (a) that any necessary consumption of water by a proprietor to satisfy his natural wants is reasonable, whatever may be the extent of the use even to the exhaustion of the supply; (b) as amongst the artificial uses, whether or not a particular use is reasonable will depend upon all the circumstances; (c) in the arid portions of the State, where, on account of the insufficient rainfall, the need of irrigation is great, and that of other artificial uses relatively unimportant, use of the waters for that purpose is reasonable even though such use deprives other proprietors of the enjoyment of the water for other artificial uses; (d) that water for irrigation when not indispensable, but used merely for the increasing of the products of the soil, is not to be classed as one of the natural uses.

The "Texas rule" then is one of equal rights as among the riparian proprietors, but of priority among artificial uses according to the exigencies of the situation. In other words, it is one of priority among uses, and not users. Can a rule so obviously just, and so abundantly in line with the learning of the past, need defense at my hands? In this, as in other matters, we believe in equal rights to all, and abhor the semblance of monopoly. The reason which is supposed to underlie the principle that the supply of a stream may be exhausted by one owner for purposes of irrigation, is the paramount importance of that use as compared to other artificial uses. But a moment's reflection will serve to show

that it is of no more importance to the State,—the public,—that one owner should reap the benefits of beneficent providence in this respect, that than many should do so. Every principle of law and of right demands that every owner whose lands abut upon a natural stream shall have exactly the same rights with every other owner in the flow of the stream which, by all the authorities, including our own, is held to be parcel of his estate, and property in the eyes of the law. He can not be deprived of this right by legislative enactment except upon full compensation, much less by the greed of an upper co-proprietor. It may be admitted, and is true, that we have made a departure from the established rule of the common law in the matter of thus determining among artificial uses; but our condition, environments, necessities and customs are different, and in the practical application of the common law rule of reasonable use among co-proprietors, we are justified by the very spirit of the rule itself in holding that to exhaust the water among the riparian owners for the purpose of making productive their otherwise barren land, is a more reasonable use than to require the undiminished flow to find its way to the sea, because, forsooth, it may be used for motive power or other commercial use along its course. It were better that all should be thus utilized than that any should be allowed to go to waste. At common law such use was not reasonable; the use of the stream for those purposes which least interfered with or diminished the flow was held to be the most reasonable. But what is reasonable in one case may not be so in another. Climate, necessities, customs, rainfall,—these should enter into the consideration. In speaking of necessities of the situation, it is, of course, meant,—not the natural wants such as drink and domestic use, for within this class, as I understand it, would be included sufficient water for irrigating the kitchen garden, same being a necessity or natural want, precisely as the use for drink and other domestic purposes,—but the relative importance of the one use over the other as determined from the customs, pursuits, and wants of the people of the particular locality. So that the use of water for irrigation may be reasonable not only in those cases where indispensable, but in those cases also where it renders the cultivation of the soil more profitable. And while in the adjudicated cases this interpretation of the doctrine of reasonable use has been made only in controversies arising in the arid or semi-arid portions of the State; yet, I dare to express the opinion, that even in the humid parts where irrigation may profitably be resorted to, for instance, in the rice-growing districts, and where the necessity for other artificial uses is compara-

tively unimportant, that the same conclusions will be reached. This is not, then, the adoption of a rule of law applicable to parts only of the State, as has been charged, but rather is it an announcement of the familiar principle that in all cases the use must be reasonable, having due regard for the rights of others, and that in each case the question of reasonableness is one of fact to be determined from all the circumstances in evidence. This is analogous to the principle which says that while ordinarily one may use his own as he pleases, yet he may not do so if that use, in view of the rights of another, is unreasonable. A butcher may build his slaughter house upon his farm distant from human habitation, but he can not build it upon his residence lot in the populous city. A Ward county proprietor may operate his grist mill with the power acquired from the momentum of the Pecos river, but would it be a reasonable use of such stream,—the common property of the many,—for him to demand the uninterrupted flow for such purpose when it would result in depriving a neighborhood of the right to irrigate ten thousand acres of grapes? Would a use so palpably unreasonable be permitted by our law? If so, one would doubtless be justified in exclaiming with Dorothy Dix, when she learned that a New Jersey justice had allowed six thousand dollars damages for the death of a boy, and only one-half that sum for the death of a girl, "The law is an ass." Will the law deny water to the two hundred and thiry-five thousand acres of rice in the humid coastal plains of Texas merely that ancient mills may be turned by the streams as they were wont to flow in that locality? The decisions of our courts with one accord all answer, No. On the other hand, as between individuals, whether in the arid, the semi-arid or the humid belt, in respect to their rights to divert the water of the streams of this State and to water their lands, thus making mother earth to yield forth the bounties of her wealth, will the law say to him who is lowest on the stream that he has no rights which the owners above him are bound to respect? The spirit of every decision, and of every legislative act in this State, and every dictate of common fairness and of right, answer, No.

It is a great injustice to our State that we should have been aligned with so unjust a rule as the contrary. Not one word has ever been written by court or text writer in defense of such legal impossibility. Under our system the capitalist or the trucker, with absolute assurance of his just proportion of the benefits to be derived from the flowing stream, may invest his means and his labor in the improvement of his holding wherever the same may

be situated upon the stream. He need never fear the aggression of the owner above him. The acre at the head spring is just as valuable, and entitled to precisely the same rights, as is the one at its mouth, and no more.

Many of the thoughts here advanced have found expression in Clements vs. Watkins Land Company, recently decided by the Court of Civil Appeals for the Second District. It is there said: "These cases establish to our minds a most salutary doctrine, i. e., that in the arid portions of the State where the need of irrigation is great and that of other artificial uses relatively unimportant, the rule of reasonable use, under all the circumstances, will permit the exhaustion of the water supply for the former purposes as against the latter. That this is the saner view, under the conditions obtaining with us, than would be the rule of the common law, itself the growth of a country where there is little or no need of irrigation, there can be little question. Both uses are inferior to the use of the water for quenching thirst, and as between the two the question of priority is to be determined from all the surroundings,—the locality, needs and customs of the people, etc. The confusion existing in the minds of the profession as to the scope of the 'Texas rule' has arisen, we think, from their failure to properly 'separate the grain of decided law from the chaff of judicial comment.'"

VENDOR'S LIENS IN TEXAS—AN HISTORICAL ESSAY.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

THOMAS SHEARON, ESQ.,

OF THE DALLAS BAR.

It was a remark of Lord Coke that the law is still unknown to him that knoweth not the reason of the law, and Chief Justice Roberts was wont to remark, when exclaiming upon the beauties of the common law, that the law is a science only a little less exact than that of mathematics. Whether either could have justified ultimate conclusions, using these remarks for premises, may be easily questioned, for Coke said: "There is reason in all things except an act of Parliament"; and, "God knoweth all things except the conclusions of a petit jury." And Roberts must have overlooked the uncertainty of the length of the chancellor's foot. Nevertheless, the examination into the reason of a rule by reviewing the history of its origin affords entertainment and at times instruction; and, if law be a science, even though not an exact one, its development into a science has largely depended on the use by legislators and jurists of terms of precision, and for laxity herein —at least so far as the subject of this paper is concerned—the writer can but humbly remark that their sins of omission and commission have been many; and the lexicographers of the law and of the English language—or at least those to whose works the writer has access—have been negligent or unfortunate in tracing the origin of the word "lien," or at least of its antonym (if it be an antonym) "alien."

At common law the word "lien" meant the right to hold posses-

sion of the property of another until the lienor received satisfaction of a money demand, and the word "alien" meant to convey or part with the possession. The noun "lien" was a Norman-French term, probably synonymous with the modern French "lign," meaning a line or string, having the same Latin root as the word "liege," viz., a lord or holder; and in the opinion of the writer the word "alien" was the word "lien" with the ablative or negative prefix "a," though Webster indicates that it is a Latin derivative, having the same root as alius, another, and the verb, "alieno," to part with—quoting a sentence from Lord Hale: "If a man alien his land." I incline to the belief that, were it a Latin derivative, the early law writers would have used the term "alienate" rather than the harsher Norman sound.

The analysis of the rules governing the relation of the vendor and vendee, and their respective rights and remedies, requires a consideration of the organization and history of the courts in which these rights have been and are adjudicated and the remedies administered.

At the time of the American Revolution the English courts were divided into separate courts of law and equity, each administering a widely variant system of jurisprudence, though the chancellor, as theoretical keeper of the king's conscience, had, by persistent effort continued through several hundred years, been able to encroach upon the jurisdiction of certain branches of the law, and in those instances where his system of jurisprudence contravened the law as administered by the judges of the court of king's bench, he resorted to the fiction that he might enjoin the litigant though he was without power to control the judge, and in these two systems the rights and remedies touching the uncompleted conveyances of land fundamentally differ. At common law, if the contract were executed, the vendor had no action against the land for any part of the purchase money, merely having a personal action of debt and an execution therefor as in any other judgment. If, however, the contract was executory, upon default by the vendee he might bring an ejectment; and, if the vendee interposed his deed, then by way of replication the vendor could set up the breach of the condition to pay the purchase money, just as a breach of any other condition, and thus avoid the effect of his deed;[1] for, when the vendee had renounced the contract and refused to fulfill his stipulations, the vendor was entitled to his writ, and the consideration by way of part performance was forfeited by the party guilty of

1. Washburn, Par. 938.

the breach. Contrawise, if payment was made before livery of seizin, if the vendee was detained from possession, he could recover of the vendor for the breach of the contract or for money had and received.[2]

In equity, however, the vendor was said to have a lien, either express or implied, for the unpaid purchase money, and the vendee a lien for purchase money advanced before title made.[3] How an equitable lien may be defined passeth the understanding of the writer, for its definition has been attempted unsuccessfully by able jurists. It is not a right to possess the land pending the satisfaction of a money demand, nor even an estate in the land, either legal or equitable,[4] but only the right to have the land sold for the satisfaction of the debt. It is probably an unskillful translation of the civil law term "privilegia." In the courts of equity, the vendor's title was called a lien, and the vendee's title, his equity of redemption. Upon default, the vendor, if he elected to begin his action in a court of equity, prayed for an accounting of the amount due, for a foreclosure of the vendee's equity of redemption, and for a sale of the land for the joint account; the debt, however, to be first satisfied out of the proceeds before the vendee received the balance. Or, in a court of equity, he might set up such matters as showed that the vendee had already received sufficient indulgence, and ask for a foreclosure without sale or strict foreclosure. In this latter case, however, it was necessary to plead such a state of facts as showed that the vendee had received a fair consideration by way of rents and profits or otherwise for the money paid, and that he had been sufficiently indulged in the payment of the debt after default.[5] And in like manner the vendor or vendee, upon a sufficient showing of fraud by way of failure of title, or for other reasons, might set up his equities and ask for a rescission, and, upon obtaining a judgment of rescission, either might prosecute in a court of law his action against the other for rents, profits, or for money had and received.[6] When the vendor or the vendee elected to begin his action at law, and the opposite party had rights in equity, then, upon the institution of the action at law, the other party instituted his suit in equity and

2. Sutton vs. Page, 4 Texas, 147.

3. Washburn, Pars. 1039-1040.

4. Washburn, Par. 1029 (citing 1 Mason, 191, Story).

5. Adams' Equity, p. 128.

6. Adams' Equity, p. 174.

asked that further proceedings in the action at law be stayed until the equities between the parties were decided—a practice which is still followed in our Federal courts. For example: The vendor sued in ejectment at law, whereupon the vendee might file his bill for redemption, tender the unpaid purchase money, and have his injunction against the further prosecution of the action of ejectment. Or, if the vendee instituted an action for money had and received, the vendor might set up his equities for an accounting for the rents and have the action for money had and received stayed until the equities were adjusted. At law, the parties stood upon the contract as nominated in the bond, and as either party was able or willing to comply with the letter of the contract only might he have his remedy at law against the other. In equity, however, if a compliance with the exact terms of the contract created such a state of facts as shocked the conscience of the chancellor, he might resort to some further administration of the business in hand in order that one party might receive the least amount of damage, while the other party secured the full proceeds of his bargain. It was the practice in equity to allow the defaulting vendee six months after judgment to pay the debt, failing which the vendor was awarded a writ of restitution.[7] It became common, however, afterward to foreclose the equity of redemption, and, if the debt was not paid, to order a sale of the land for the mutual account.[8]

Texas jurisprudence offers an example of the meeting of two currents of judicial administration. The Roman civil law came to this territory with the Spanish Conquistadors, and the English law followed the English speaking adventurers who overflowed this territory in the second quarter of the nineteenth century. The downfall of Mexican politics was rapdily followed by the exile of civil law jurisprudence. Nevertheless, the vendor's lien, which came as an equitable appendage upon the body of the common law—itself a creature of the civil law, fastened upon English jurisprudence by the encroachments of the Ecclesiastical courts—but succeeded to the civil law doctrine of the vendor's privilege.[9] The founders of the republic in their wisdom—or, as sometimes occurs to the writer, in their want of it—failed to keep alive the distinction maintained at that time in almost all of the American juris-

7. Adams' Equity, p. 114.

8. Adams' Equity, p. 121.

9. Briscoe vs. Bronough, 1 Texas, 329.

dictions between courts of law and courts of equity,[10] and the abolition of this distinction obviating the necessity to keep in mind the nice distinction of terms has led to much confusion in judicial expressions in the adjudication of the mutual rights of vendors and vendees. This confusion has been further augmented by the statute reducing all real actions to the common law form of an action in ejectment. The first enunciation of the common law doctrine in the State of Texas was in the year 1848, in the case of Estes vs. Browning,[11] which was an action by the vendor for the land against his vendee under bond for title, wherein it was held that the vendor might recover the land without accounting for the purchase money paid, the vendee being in default on the balance; and this though the vendee was dead. And, shortly thereafter, it was held[12] that, though the vendee was dead and administration pending on his estate, and the vendor had failed to prove his claim as a debt against the estate, it was the duty of the administrator to pay the debt in order that the estate might receive the benefit of the payments made during the lifetime of the decedent. And this doctrine is carried over to a case where the transfer was by deed,[13] because a vendor's lien was retained; the court holding that a deed with a vendor's lien retained was merely an executory contract for the conveyance of land, and that the vendee under such a deed received merely an equity of redemption. How this doctrine is reconcilable to the proposition that the vendor's lien is a creature of equity, it is hard to say; for, if the vendor's lien is a creature of equity, the reservation of the equity by the vendor would not be a reservation of the legal title, and, therefore, the deed is executed and not executory. Perhaps this confusion arose out of the fact that probably in the earlier days the reservation of the vendor's lien was couched in terms of a reservation of the title rather than a mere recitation that a lien was retained; it seeming to have been the former practice for the vendor to insert a condition precedent in lieu of vendor's lien clause, to the effect that not until the notes were paid would the title pass. Be that as it may, the courts, if not in confusion at that time, thereafter fell into confusion in holding a reservation of the vendor's lien to be a reservation of the legal title, and further carrying the doctrine to extremes by holding that the vendee's possession was tortious

10. Revised Statutes, 1106.

11. 3 Texas, 494.

12. Robertson vs. Paul, 16 Texas, 472.

13. Foster vs. Powers, 64 Texas, 249.

after default,[14] the purchase money being unpaid, even though the notes were given for deferred payments and the notes barred as to personal action.[15]

Touching the equitable rights and remedies of parties in regard to deferred payments, our courts have followed a much more consistent line of adjudication. Taking the civil law as a basis, and remarking that equity was but an incorporation of the civil law into English jurisprudence, the court in the very early case of Briscoe vs. Bronough,[16] says that the vendor has a natural equity that the land should stand charged with so much of the purchase money as was not paid, and that without any special agreement for that purpose. And this doctrine has never been qualified, criticised, or confused—the courts treating the parties by implication of equity as trustees for each other, and the vendor's claim being regarded as an equitable mortgage—an incident of the contract if there was no other security for the purchase money; for the presumption is that the seller may look to the thing sold for the security of the purchase price thereof. Unless it affirmatively appear that it was not contemplated in the transaction that he should have such equity, it is identified with the thing sold and the interest therein. Contrawise, if there was no title in the vendor, there was no lien for his security; for there could be no lien if there was no conveyance, nor can the vendor's lien be created by a subsequent contract;[17] for, if the obligation be not for purchase money, it can not be secured by a vendor's lien, nor will it follow the proceeds of the thing sold. For instance, there is no vendor's lien upon the proceeds of a fire insurance policy, though the obligation was for the purchase money of the house.[18]

Another confusion which has arisen out of the failure of the courts to keep before them the distinction between the legal and equitable positions of the parties has been the application of the law of limitation. The doctrine of limitation has been one viewed with favor by the courts of Texas from the beginning;[19] but, by holding that the vendor had a superior title and that the vendee was a tenant at sufferance after default, they have applied the doc-

14. Browning vs. Estes, 3 Texas, 494.

15. Baker vs. Rainey, 27 Texas, 59.

16. 1 Texas, 329.

17. Pease vs. Loan Association, 83 Texas, 53.

18. Cameron vs. Fay, 55 Texas, 61.

19. McDougle vs. Smith, 1 Texas, 493.

trine that there was no bar of the vendor's right of re-entry.[20] An early case undoubtedly stated correctly a principle of the law holding that, if the vendee under a deed reserving a lien for deferred payments after the maturity of the obligation sell the land and warrant the title to his vendee, the second vendee going into possession and recording his deed, this state of facts would invoke the five years' statute.[21] This case, however seems to have been forgotten in subsequent decisions by our courts. Taking also the theory in equity that the vendor and vendee are mutually trustees for each other, then it would seem to follow that a default by the vendee would be a renunciation of the trust relation, and that thereafter the statute would run by analogy; our courts having always been inclined to the doctrine which applies statutory terms to equitable remedies, and Chief Justice Roberts in an early case laid down this as the correct rule,[22] and Chief Justice Stayton citing this case reaffirmed the rule, and said that a person dealing with the vendee was entitled to presume that the purchase money was paid when ten years had intervened after its maturity.[23] The equity of redemption after default was repealed in Texas in 1846, so that the vendor's remedy of strict foreclosure and the vendee's period of indulgence, which was usually fixed at six months after judgment, were both abolished, and a sale as under execution ordered in cases of judgments of foreclosure.[24] And in this statute, as well as in the decisions of the court, runs a misuse of the term "foreclosure," it using the term "a foreclosure of the plaintiff's lien" instead of abolishing the vendee's equity of redemption and therefore dispensing with the need of a judgment of foreclosure, but providing for a statutory sale of the land. For it was the equity of redemption that was foreclosed and not the lien. For, if a judgment should be taken at its exact meaning and provide for a foreclosure of the lien, then would the lien be gone.

These criticisms, though humbly offered, commend themselves to the writer as fully justified by a review of the history of the law and the adjudication thereof. It seems that, if the deed simply reserves a vendor's lien, that vendor's lien being an equity,

20. Lander vs. Rounsaville, 12 Texas, 198.

21. Robertson vs. Wood, 15 Texas, 4.

22. Walker vs. Emerson, 20 Texas, 706.

23. Weems vs. Masterson, 80 Texas, 55.

24. Revised Statutes, 1340.

then that the legal title must pass to the vendee, and that the reservation is a condition subsequent. If, instead of the reservation of a vendor's lien, the payment of the purchase money obligation is by definite and artful terms made a condition precedent, then that the legal title would remain with the vendor. If the legal title remain with the vendor, then, upon default, that he would be entitled to bring his action for the land; but that the vendee might answer and tender the purchase money obligation and reconvene for the divesture of the vendor's title, or that the vendee himself might ask for a sale for the satisfaction of the deferred payments, and that he might receive any surplus out of such proceeds remaining. So, also, if the vendor brought an equitable action of rescission and cancellation, then that the vendee might likewise plead his equities. If the vendor sue upon the notes and for a foreclosure, and the vendee interpose the statute of limitation, then must the vendor dismiss his equitable action, and by way of amendment bring a legal action for the land; and, if the statute of limitation still be persisted in, then must the vendee stand or fall by his plea of the statute; for he who seeks equity must do equity. If the action in all its phases is a legal action, then it seems that the sounder rule would be to apply the five and ten years' statute after default on the deferred payments. If, on the other hand, the case assumes the feature of a suit in equity, then by analogy the courts should enforce the ten years' statute, and this without regard to the condition of actual possession.

NEEDED AMENDMENTS TO THE PROBATE LAW.

A PAPER READ BEFORE THE

TEXAS BAR ASSOCIATION,

BY

HON. LEWIS FISHER,

OF GALVESTON.

Mr. President and Members of the State Bar Association:

It is probable that during the past four years the county judges of Galveston county, that is, my predecessors Judges Mann and Campbell and I, have had to do more with the probate practice in all its various forms than any other probate judges in Texas, if not in the United States; and have therefore come face to face with the very cumbersome and expensive practice of our State. This large probate business was due to the vast number of estates filed in Galveston county immediately after the storm of 1900; there having been since that date approximately two thousand cases filed in the probate court of that county.

I wish very much that I had the time to enter into the details of the subject of "Needed Amendments to the Probate Law"; but it is impossible to cover the subject in this paper, and should I attempt such a vast undertaking I would infringe upon the time and the rights of others who are prepared to present to you some interesting and instructive papers.

I deem it sufficient, therefore, simply to call the attention of this body to a few of the defects and inconsistencies in our probate practice, and I trust that I may do so in such a manner as that some of them may be cured by future legislation and our probate practice become thereby more simplified and practical.

In connection with Mr. Neethe, of the Galveston bar, who is a

member of the Committee on Remedial Procedure, and who was asked to write its report, and who joins me in these suggestions, the following are submitted to you for your consideration:

First. In the matter of a uniform system of citation:

The lack of greater uniformity in reference to citations, notices and their service in probate matters is a source of constant worry to the busy lawyer. An investigation of the statutes will show that there are sixty-eight articles of the probate code which deal with citations and notices and the method in which they are to be served, either by personal service, by posting or by publication in some newspaper. Of this number forty-seven are contained in the title "Estates of Decedents," and twenty-one in the title "Guardian and Ward." We see no reason why a uniform method of service, as well as a uniform time of service, should not be enacted, and suggest that in all instances personal service of any notice or citation should be ten days before the term of the probate court, at which the matters on which the notice or citation issued can be taken up, and that in all instances where personal service is not possible for any reason, service be had by publication in a newspaper, for, say, ten days prior to the first day of the term to which such citation issued; provided, that the practice of having "terms" in probate matters is not entirely abolished, as hereinafter suggested.

Second: In the matter of abolishing "terms" in probate courts:

We think that the practice of having "terms" in probate matters should be abolished, or that some law should be enacted by which a will can be admitted to probate, or administration opened on an estate, at any time after legal notice, whether it be in term time or vacation. Great inconvenience and expense is frequently imposed upon the beneficiaries under a will by having to wait until a term of court is reached before a will can be admitted to probate, or regular administration opened on an estate. There is no reason why this cumbersome procedure should not be abolished and the probate court opened at all times for such purposes. What can be the purpose of having "terms" in probate matters? There is no reason why a sale of real estate belonging to an estate should not be made as readily in vacation as when the order for its sale is entered at a term, and, usually speaking, as all these proceedings in probate are well ex parte, the necessity of having a fixed day certain within which the other side to a controversy may prepare its defense, wholly fails. A very striking example of the expense and cumbersomeness of our present practice may here be amply cited; e. g.:

A. died in June of this year, leaving an estate of the value of some sixty thousand dollars. He left a will devising his property to various persons. The bulk of his estate consisted of rent houses, the monthly rent roll being some $400. Immediately upon his death his will was filed for probate, too late, however, for service to the June term. The next term of court does not convene until the latter part of September, hence his will can not be admitted to probate for, practically, four months. The tenants refuse to pay the rent. What is to be done to collect it, pending the probate of his will? Nothing except to take out temporary administration and thereby incur an unnecessary and heavy expense.

But, in the event that we are in error in regard to this, and it is deemed advisable to retain terms in probate matters, then we suggest that all proceedings should be had to a time, as in a common law court. This would do away with constant inquiry of the probate lawyer whether or not, for instance, a citation on an annual account should be to a term certain, or if such matter can be taken up at any time during a term after twenty days' notice, and many other like instances.

Third. In the matter of the reduction of expenses in probate matters:

The costs of administration in this State are, we believe, higher than in any other State. The commissions allowed administrators, 5 per cent on the amount received and 5 per cent on the amount paid out, or practically 10 per cent of the value of an estate the assets of which are about equal to its liabilities, the amount of commissions to the judge of the probate court, clerk's fees, sheriff's fees, the expense of counsel, the extra compensation that may be granted to an administrator under the statute, frequently render an estate, which was perfectly solvent when its owner lived, absolutely insolvent upon his death, especially when one comes to consider the holding of the courts that the presentation of a claim to an executor or administrator, and its subsequent approval by the probate court, entitles the holder to the attorney's fees that may be stipulated for in a contract that he may hold against the estate of the decedent. In other words, the 10 per cent, or more, which are deducted from the assets, and the 10 per cent attorney's fees usually provided for in contracts for the payment of money, and which are added to the liabilities of the estate, all are charges which should be reduced.

An enactment that the mere presentation of a claim to an administrator shall not entitle him who presents it to the attorney's fees stipulated for, unless there be some contest, would, we think, be very beneficial.

Administrations are too frequently granted to persons who have absolutely no concern with the estate left by decedent, or with the heirs, and some discretion should be given to the county judge, permitting him to grant or refuse administrations, unless heirs apply for the same, or unless a creditor applies who shall show that unless administration is granted his debt is likely to be endangered. After the storm in Galveston, a great number of administrations were granted to people who had absolutely no connection with the estates on which they sought administration, nor with the heirs entitled to them, their only object and purpose in taking out administration being to earn the commissions allowed by the statute.

A great many of the States have established an office called "The Public Administrator." He takes the place of "any person of good character residing in the county" entitled to take out an administration under Article 1914. Administration to him usually is only granted when there is no application made by any of the heirs or next of kin, and then usually only on the application of a creditor who can not collect his debt in any other way. The creation of such an office in this State should be considered.

Fourth. A few inconsistencies and contradictory provisions of our probate practice:

Of the many inconsistencies and contradictory provisions of our probate practice, it is almost needless to speak, as every lawyer with any amount of probate practice has had cause to suffer from them. A very few of the great number are here cited. For example, Article 1851 enumerates the papers entitled to record in probate. It does not name "citation for sale of real estate"; and Article 2125 provides that citation for sale of real estate shall be recorded in like manner as other citations and returns thereon. Why in Article 2125, "Estates of Decedents," thirty days should be required before the term at which an order for the sale of real estate shall be granted, and in Article 2636 similar sales under the title of "Guardian and Ward" should require only twenty days, is, to say the least, hard to be explained. Also, why Article 2694, "Guardian and Ward," should provide for a publication once a week for three successive weeks in a newspaper, while citations of a similar nature in the title "Estates of Decedents" are either posted or printed daily for twenty days.

Articles 1875 and 1876, referring to the annual accounts of administrators or executors, and the citations necessary to be issued before the approval of such account, instead of being sandwiched in Chapter 3, "General Provisions," more properly belong

to Chapter 11, "Certain Rights, Duties and Powers of Executors and Administrators."

To what term should the clerk issue citation in guardianship accounts is another question much debated. The statutes provide that an annual account must lay over one term, and it is doubtful whether or not the citation should be issued returnable to the ensuing term, or to the term following the same, at which this account can for the first time be acted on by the judge.

Article 2764, under title "Guardian and Ward," should be reframed, so that the court shall have the right to close a guardianship when for any reason there is no further necessity for guardianship. There is no provision now in the statutes providing for the closing of guardianship except in case of the death of the ward, or of a minor attaining his majority.

Fifth. Foreign administration:

Article 2181 provides for a very cumbersome method of having a guardian appointed in the courts of any other State qualifying within this State, for certain purposes. It excludes mentioning anything of guardians appointed by any foreign sovereignty. A similar criticism is made in reference to Articles 2753 and 2754. There is no reason why the rule of the civil law should not be adopted in this State, which is, that the appointment of a guardian or executor lawful in the country where the executor or ward resides, should be valid the world over, and that dealings with them should be as legal as if such guardian or executor had been appointed under the statutes of our State. For example, it has been held in Massachusetts and Pennsylvania that the adoption of a child lawful in the place where the adopted parent and adopted child reside, is lawful everywhere, even to the extent to cast descent of real estate situated in another State or country, and there is no reason why the mere personal relation between an executor and the estate he represents, or between the guardian and his ward, as long as it is lawful where such relation was created, should not be lawful everywhere. A great step in this direction has, of course, been taken by the statute recently passed validating the deeds of foreign executors for real estate in this State, and there is no reason why this privilege should not extend to all like fiduciary relations.

In conclusion, it is respectfully suggested that steps be taken providing for the appointment by the next Legislature of three to five able lawyers, experienced in probate matters, to reframe our probate code, to the end that our probate law may be made more simple, practical and satisfactory.

INDEX.

A.

N.

O.

P.

S.

T.

U.

V.